Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-72

WALTER COX,

Petitioner,

—against—

FLOTA MERCANTE GRANCOLOMBIANA, S.A.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States.

Petitioner, Walter Cox, prays that a Writ of Certiorari be issued to review the decision and judgment of the United States Court of Appeals for the Second Circuit decided May 10, 1978 reversing a judgment in favor of plaintiff and dismissing the complaint.

Opinions Below

The Opinion of the Court of Appeals in *Cox* v. *Flota Mercante Grancolombiana, S.A.* is not yet officially reported and is made a part of the Appendix to this Petition. The Opinion of the United States Court of Appeals for the

Second Circuit in the case of *Anthony Canizzo* v. *Farrell Lines Inc.* and *Universal Terminal & Stevedoring Corp.* v. *Frank J. Holleran, Inc.*, decided June 2, 1978, is not yet officially reported and is printed in the Appendix to this Petition.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on May 10, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1). Diversity of citizenship and damages exceeding the jurisdictional amount were the bases for Federal jurisdiction in the court of first instance.

Questions Presented for Review

1. When the negligence of a shipowner combines with the negligence of an independent stevedore to cause injury to a longshoreman, is shipowner relieved of its liability for its negligence?

2. Where shipowner has the responsibility to furnish and insert securing devices (pins) for beams and its mate states he will take care of it but fails to do so, is it relieved of liability for its negligence because the stevedore knew of the dangerous condition of unsecured beams even though stevedore did not have the means of securing the beams and shipowner did?

3. Where shipowner, having the duty to furnish a longshoreman with a reasonably safe place to work, fails to do so, and knowingly creates a dangerous condition which

he alone has the means of abating, resulting in injury to a longshoreman, is shipowner relieved of liability for its negligence as a matter of law because the stevedore knew of the condition so created and also had the duty to furnish a reasonably safe place to work, but not the means of abating the danger?

4. Is knowledge by stevedore of a dangerous condition with no such knowledge on the part of the injured longshoreman sufficient to relieve shipowner of liability for its negligence when shipowner created the condition by failing to secure the beam and was the only one in control of the means of abating the danger?

5. Is the longshoreman required to assume the risk of shipowner negligently failing to secure a beam which it has the responsibility and means of doing so, when stevedore and its longshoremen proceed with their work relying on shipowner performing in accordance with its responsibility and expressed statement it would secure the beam?

6. Is supervision of the longshoremen now the determining factor under the law of negligence for holding shipowner liable, substituting such provision for the control of defective ship's equipment or failure to furnish necessary ship's equipment?

7. Where shipowner is in control of the beam securing devices which they had the duty to furnish and apply, and the ship's mate informs stevedore he would take care of securing the beam but fails to do so, is shipowner relieved of its liability for its negligence which results in injury to a longshoreman because the stevedore supervises its employees and knows of the unsecured beams?

8. Where stevedores supervise their longshoremen and tell them where and when to work, does such supervision relieve shipowner of its liability for its negligence where it had the duty to furnish the securing devices (beam locks and pins which are ship's equipment) and insert the pins, and ship's mate said he would take care of it but failed to so do, when stevedore had no means of securing the beam?

9. Is the land-based law of negligence as set forth in Sections 343-343A of the Restatement of Torts (Second), as applied in *Napoli* v. *Hellenic Lines, Ltd.*, 536 F.2d 505 (2 Cir. 1976) to be limited only to situations where shipowner is the stevedore?

10. Is an injured longshoreman denied the right to sue shipowner for its negligence under the Longshoremen's and Harbor Workers' Act, 33 U.S.C. 905(b) because his compensation benefits have been increased under the statute?

Statutes Involved

The statutory provision involved in The Longshoremen's and Harbor Workers' Compensation Act 33 U.S.C. 905(b):

In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of Section 933 of this title and the employer shall not be liable to the vessel for such damages directly or indirectly and any

agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

Statement of the Case

Plaintiff, a longshoreman employed by Universal Maritime Service, was injured in the lower hold of Hatch No. 2 of shipowner's vessel on May 31, 1975 when a hatch beam at the tween deck level came out of its slot and fell into the hold, together with the hatch covers it had been supporting.

There was coffee on the tween deck with only a small amount at the forward end and the bulk aft. It was decided to work the hatch as a split hatch, i.e., two gangs in the hatch, one forward and one aft. Since the forward gang would be through quickly discharging coffee at their end, when finished they were to open the square at their end and work on the cargo in the lower hold. This was done

and at 10:30 A.M. they opened the forward portion of the tween deck and went below.

The beams and the hatch covers of the aft portion of the tween deck square were left in place, as they had to be, and the aft gang was performing its work on such covers. Thus, there were two gangs working on different levels in the same hatch. Working two gangs in this hatch as a split hatch was usual and frequent on this ship and its sister ships.

The beams and the brackets holding same were so constructed that the beams were to be secured by means of locks and pins. The beams had locks on them. In addition, there were holes in the brackets which held the ends of the beam and there were holes in the end of the beam. The holes were aligned for the insertion of safety pins through them. The beam had to be both locked and pinned for safety reasons while working the hatch as a split hatch.

The pins were ship's equipment and were to be supplied and inserted by the ship's crew. The stevedores do not have pins for that purpose.

The ship's mate was asked and told a number of times between 10:30 A.M. and 3:00 P.M. to make sure it was safe to work, to put the pins in and to make sure the pins were in. Although the mate repeatedly responded that he would take care of it, he never produced any pins and the beam was not secured. Securing the beam was a responsibility assumed by shipowner and was seaman's work. It was not delegated by shipowner to stevedores.

Failure to secure a beam adequately when working a split hatch exposes the longshorman below to the danger of the accidental lifting of the beam out of its slot and its falling when cargo is dragged or lifted and the cargo hook or fall comes in contact with the beam; and occasionally cargo being raised would strike a beam. This contact and striking is not unusual.

At the time of the accident at about 3:00 P.M. pallets were being dragged from the wings into the square and lifted by means of ship's winch. The cargo hook caught on the beam and because it was not pinned down it had to fall together with the hatch covers it was supporting. Plaintiff was struck by one of the hatch covers that fell.

While working in the hatch plaintiff did not know whether the beam was secured or not since he had nothing to do with the securing of the beam—as he was a longshoreman and not a seaman.

The Trial Court charged the jury in accordance with *Napoli* v. *Transpacific Carriers Corp.*, 536 F.2d 505 (2d Cir. 1976) and the jury brought in a verdict of $75,000 in favor of plaintiff. Motions for a directed verdict and the post trial motion to set the verdict aside were denied.

Defendant appealed to the United States Court of Appeals for the Second Circuit who reversed the judgment and dismissed the complaint.

The Decision in *Cox*

The Circuit Court held that shipowner was relieved of responsibility in negligence to the longshoremen for the following reasons:

1. The question is not whether shipowner was negligent but whether stevedores knew of the dangerous condition. If they did have knowledge they violated their duty under the Safety & Health Regulations. Since they supervise their longshoremen as to when and where they work it was their responsibility to see that the place of work was safe. Shipowner cannot, therefore, be held liable for their negligence to a longshoreman as long as stevedore knows of the danger. The Restatement of Torts (Second), Sections 343-343A as set forth in *Napoli* v. *Helenic Lines Ltd.*, 536 F.2d 505 (2 Cir. 1976) is inapplicable as that case only refers to situations where the shipowner is the stevedore.

The facts recited in the opinion show that the Court made its decision taking into account the testimony that the ship supplied the beam locks and were to supply the pins to secure the beams; that both were ship's equipment; that stevedores did not have the necessary pins; that the ship's crew were to put in the pins to secure the beam; that the ship's mate was requested to secure the beam a number of times and he stated that he would take care of it but he failed to do so. Thus, the Court held that even where shipowner was in control of the pins necessary to secure the beams, and failed to furnish and insert them despite their obligation to do so and after saying they would, is not material to a suit by longshoremen against a shipowner for its negligence.

2. Since the dismissal of the complaint was obviously unjust and the result harsh, the Court rationalized that the Workmens Compensation benefits have been increased under the amended statute and, hence, the longshoreman receiving such benefits is being adequately compensated for any injury he sustained; that depriving him of a cause of action against shipowner, however negligent the latter might be, is not harsh but just.

The logical conclusion from the *Cox* decision is that a longshoreman cannot sue shipowner for its negligence once his employer knows of a dangerous condition.

Reasons For Granting the Writ

It is submitted that this Court should exercise its discretion and grant a review on Writ of Certiorari because of the following special and important reasons:

1. There is conflict and confusion in the Second Circuit amongst the Circuit Court judges with respect to the interpretation and effect of 33 USC § 905(b) of the Longshoremen's and Harbor Workers' Compensation Act as amended. The conflict has resulted in differing decisions on similar facts with uneven justice being dispensed depending upon which panel of judges sits in judgment. The District Court Judges are justifiably confused and it has already interfered with the administration of justice.

2. The *Cox* decision is in conflict with decisions of other Circuit Court cases.

3. The results of the *Cox* decision are harsh and unjust, not consistent with the objectives of the amended Section 905(b). The positions taken by the Court are contrary to

the intent of Congress and the Court is engaged in legislating law rather than applying a Congressional act.

For these reasons this Court should review the decision of the Court below and settle the questions of law raised thereby as to the meaning and application of the Statute.

I.

The Conflict Between Circuit Court Judges and Circuit Court Decisions in the Second Circuit.

The decision of the Court of Appeals in *Cox* is in conflict with a number of cases decided in the Second Circuit. The Circuit Court judges are in complete disagreement with one another as to their interpretation of the Longshoremen's and Harbor Workers' Compensation Act 33 U.S.C. Section 903 et seq. as amended. Within approximately three weeks after *Cox* was decided, the Circuit Court decided the case of *Canizzo* v. *Farrell Lines Inc. et al.* (16a). The Court in *Canizzo* stated that they disagreed with the result of the *Cox* holding and *Cox* is in conflict with *Lubrano* v. *Royal Netherlands SS Co.*, 572 F.2d 364 (2 Cir. 1978). In footnote 3 of *Canizzo* the Court stated:

> "'*Cox* v. *Flota Mercante Grancolombiana, S.A.*, was decided May 10, 1978, slip op. 2989ff, while this case was sub judice. *Cox* seems to us in conflict with at least *Lubrano* v. *Royal Netherlands S.S. Co.*, —— F.2d ——, slip op. 1533 (2d Cir. Feb. 15, 1978), among the decisions in this circuit.
>
> While each case must be determined on its own facts, the result in *Cox* cannot reasonably be reconciled with

> our result here by the differences in the factual situations, for the proof of ship's negligence in *Cox* was at least comparable to that here. With all respect, however, we must disagree with the result in *Cox*. It appears to us to do what the Congress was unwilling to do, abolish the shoreowners' liability to the injured longshoreman in negligence as well as in unseaworthiness. As Judge Friendly points out, liability of the ship for such negligence as a greasy deck attributable to the ship's company was specifically contemplated and thought to be preserved by the legislation.
>
> Litigation in this troubled field would be tidier if the Congress had eliminated altogether the ship's possible liability to longshoremen. There are, however, other considerations.
>
> Benefits under the Longshoremen's and Harbor Workers' Act have been considerably increased. We cannot overlook the fact, however, that as is usual under workmen's compensation schemes, they do not fully compensate for the loss suffered.
>
> If the ship, not a party to the employment contract, is absolved from liability for its own negligence, this uncompensated loss, which may be very great, is shifted from the negligent ship to the often innocent employee. The terms of the statute and the legislative history indicate to us that while Congress was willing to shift the burden of injury without fault to an improved compensation system for shore workers (who arguably never should have been classified with seamen anyway) it was not willing so to shift the burden of injury through the fault of the ship. This policy judgment we would leave to the Congress." (Footnote 24a-25a)

The dissent in *Canizzo* sets forth the confusion that the Circuit Court foresees amongst District Court Judges stating:

> "• • • • The last of this line of cases is *Cox* v. *Flota Mercante Grancolombiana,* Docket No. 77-7338, decided May 10, 1978, slip opinions 2989. There a unanimous panel directed dismissal of a complaint on facts which the majority properly concedes, see fn. 3, are indistinguishable from those in the instant case. While the majority disregards *Cox* because the opinion was handed down in the face of known disagreement by a majority of this panel, our district judges can scarcely be expected to function with so discordant a chorus on this court." (32a)

The District Court judges have not been able to function with unanimity. Following *Lubrano, Cox* and *Canizzo* and because of the resulting conflict, some District Court judges have put cases on the Suspense Calendar, some have stated they would charge *Cox,* some *"Pre Cox Law"* and at least one has denied a motion for summary judgment unless and until there is further elucidation of the apparent conflict. With respect to the Suspense Calendar, the adage that justice delayed is justice denied applies. As for the disagreement between Circuit Court judges and Circuit Court cases, the results of any trials in the District Court will inevitably be appealed by the losing party. This will increase the case load of the Circuit Court causing major court problems and will also delay completion of litigation. We are mindful of the verbatim interview with Chief Justice Burger reported in the U. S. News & World Report of December 19, 1977, where it is reported that appeals to Circuit Courts have increased five-fold in the past twenty years and "if this

dramatic rate of increase continues, we can only guess at the consequences. Within the life of the younger interviewers here it could require an enormous increase in judges." It was the Chief Justice's opinion that in both large and small cases "The cost of litigation bears most heavily, of course, on middle income people with small or medium size cases. Even if such an individual wins a judgment in his favor, the judgment can be drained of a good deal of its value by the expense and delay of winning it." He found it imperative that means be devised to decrease or contain the workload.

By means of this petition such means of decreasing or avoiding an avalanche of appeals because of the conflict between judges and decisions is in the hands of the Supreme Court. By granting the Writ of Certiorari requested herein and by interpreting the statute in question, setting forth guidelines as to the meaning and application thereof, would go a long way to avoid potentially burdensome problems.

What makes the *Cox* case particularly important in that connection and particularly unjust in its holding is that the facts in that case are better for the plaintiff than in *Canizzo.* Even the dissent in *Canizzo* states in Footnote 7: (32a)

> "Indeed the facts in *Cox* were stronger for the employee. There was evidence that placing pins in the beams was the ship's responsibility and that a mate had agreed with the hatch boss to supply them."

The disagreement between the circuit judges must be sharp indeed. On at least two occasions since the *Lubrano* decision was rendered, (February 15, 1978) petitions were submitted to the Circuit Court with a suggestion for an En Banc hearing involving the same issues as raised in

Cox. The petitions were denied both times for the apparent reason that the circuit court judges could not compose their differences.

Uneven justice is a result that should not be prolonged nor supported.

The *Cox* decision is contrary to other cases in the Second Circuit, e.g. *Ruffino* v. *Scindia Steam Navigation Co.*, 559 F.2d 861 (2 Cir. 1977); *Napoli* v. *Transpacific Carriers Corp.*, 536 F.2d 505 (2 Cir. 1976); *Munoz* v. *Flota Mercante Grancolombiana, S.A.*, 553 F.2d 837 (2 Cir. 1977); *Lubrano* v. *Royal Netherlands Steamship Co.*, 572 F.2d 364 (2 Cir. 1978); *Landon* v. *Leif Hoegh & Co.*, 521 F.2d 756 (2 Cir. 1975) cert. den. 423 U.S. 1053.

In *Lubrano* v. *Royal Netherlands Steamship Co.* (2 Cir.), *supra*, the Court rejected the attempt to delimit *Napoli* to situations where the ship was the stevedore and held that Section 343A of the Restatement of Torts (Second) and *Napoli* apply to situations where there is an independent stevedore. The Court also rejected any attempt to overrule *Napoli* (Footnotes 3 and 4 at 366, 367).

II.

Cox Is in Conflict With the Decisions in Other Circuits.

In *Gay & Guerra* v. *Bulk Transportation Co.*, 546 F.2d 1233 (5 Cir. 1977), the Court stated at pages 1240-1242:

> "Comment need be made, however, about the possible intimation of the holding of the district court that a vessel has no duty concerning any danger which is open and obvious to the stevedore or its employees. This indeed has been the traditional rule concerning

> owners of land and their invitees, and it has been applied in several suits brought under section 905(b). The traditional rule's appropriateness in LHWCA suits has been rejected by several courts, however, for two cogent reasons.
>
> First, the traditional rule has increasingly given way in recent years to the view that the obviousness or knowledge of a dangerous condition on certain property does not necessarily relieve the owner of his obligation to take further precautions to remedy the danger. This modern trend has been reflected in section 343 A of the Restatement (Second) of Torts, which we adopted *supra*. We agree with the Second Circuit that '[a]lthough the invitee (or in this case the employee) may be under a duty to avoid harm likely to result to him from open and obvious dangers, he may not be in a position fully to appreciate the risk or to avoid the danger even though aware of it.' *Napoli*, 536 F.2d at 508.
>
> The more telling criticism of the traditional rule, however, is that it is premised in large part on the concepts of contributory negligence and assumption of risk. As previously recounted, both of these concepts are inappropriate in section 905(b) cases. It would be wholly improper, then, indirectly to introduce these principles into LHWCA suits by adopting the traditional rule that if a hazard is open and obvious that fact alone absolves the owner of his negligence." (Footnotes omitted)

In *Brown* v. *Mitsubishi Shintaku Ginko*, 550 F.2d 331 (5 Cir. 1977) in speaking of a dangerous condition of a platform on a hilo in the control of plaintiff, the Court

stated that even the high degree of knowledge, appreciation and control possessed by Brown would not automatically preclude a plaintiff's verdict.

See, also *Samuels* v. *Empresa Lineas Maritimas Argentinas,* 573 F.2d 884 (5 Cir. May 26, 1978) and *Wiles, Jr.* v. *Delta Steamship Lines, Inc.,* 574 F.2d 1338 (5 Cir. June 15, 1978).

The *Cox* holding is likewise in conflict with *Bess* v. *Agromar Line,* 518 F.2d 738 (4 Cir. 1975). There plaintiff claimed that

> "recovery may be based upon a traditional theory of negligence. He claims that the shipowner had a duty to provide suitable plywood dunnage to be used in covering each tier of bales. It is argued that the shipowner breached that duty and, as a result, contributed to the unsafe condition which proximately caused plaintiff's injury. Since that theory of liability is based upon traditional negligence principles, it is clearly permitted by the 1972 Amendments to the Act. However, before that theory of liability could be submitted to the jury, the plaintiff must present evidence that the shipowner had a duty to provide the plywood dunnage. The district court dismissed that aspect of the case, noting that 'there is no evidence before this court that the defendant was under any duty to provide dunnage, or to have someone there to make it available, or that there was the practice in the trade to provide dunnage.'" (742)

The Circuit Court agreed finding there was no evidence of any duty on the shipowner to provide dunnage under the facts of that case.

In *Cox,* the testimony was that shipowner did have the duty to provide the pins and to insert them and shipowner breached that duty.

III.

The Conflict With the Intent of Congress and the Resulting Miscarriage of Justice.

The *Cox* decision deprives plaintiff of his rights to sue shipowner for its negligence contrary to Congressional intent and contrary to the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C.) 901 et seq. *Cox* distorts Congressional intent and a harsh result follows together with a miscarriage of justice.

The question presented by the decision in *Cox* is whether it was the intent of Congress that the longshoremen assume the risk of their employment and bear the social and economic cost of the dangerous conditions found in the maritime industry comprised of shipowners and stevedores.

Thus, in *Cox,* wrongfully and unjustifiably the Circuit Court dismissed the complaint and stated:

> "This result does not impose a hardship or injustice on the injured longshoreman. He receives the substantial benefits intended to be accorded to him by the 1972 Legislation. The entire philosophy of Workmens Compensation would be thwarted by a contrary result." (14a)

It is most difficult to understand what could be the "philosophy of Workmens Compensation" which would be thwarted if a longshoreman were permitted to sue a shipowner for its negligence. It should be noted that the in-

crease in compensation payments was sorely needed and the Senate Committee Report on Labor and Public Welfare (S. Rep. No. 92-1125, 92d Cong. 2d Sess. 1972) described the need for the bill as follows:

> "The Longshoremen's and Harbor Workers' Compensation Act was last amended in 1961, at which time the maximum benefit under the Act was set at $70 per week. . . . Clearly, in order to provide adequate income replacement for disabled workers covered under this law substantial increase in benefits is urgently required." (Sen. Rep. 4)

The compromise which was effectuated by the amended act eliminated suits against vessels "brought for injuries to longshoremen under the doctrine of seaworthiness and outlawing indemnification actions and "hold harmless" or indemnity agreements. It continues to allow suits against vessels or other third parties for negligence. At the same time it raises benefits to a level commensurate with present day salaries and with the needs of injured workers whose sole support will be payments under the Act." (Sen. Rep., at 5.)

Thus, it was not the intention of Congress to eliminate a longshoreman's cause of action for negligence against a shipowner and the increase in compensation payments was part of a compromise based on an urgently needed increase in benefits traded off against the elimination of a claim of unseaworthiness.

Section 905(b) of the Act specifically grants the longshoremen the right to sue shipowner for negligence.

The Senate Committee Report states:

> "Permitting actions against the vessel based on negligence will meet the objective of encouraging safety because the vessel will still be required to exercise the same care as a land-based person in providing a safe place to work. Thus, nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective active where it knows or should have known about a dangerous condition. (Sen. Rep. 10.)

The Safety and Health Regulations for Longshoring, 29 C.F.R. 1918 et seq., do not relieve shipowner of its duties and obligations owed to longshoremen.

Section 1918.2(b) of the Regulations states that its intent is not to place additional responsibilities on owners "nor is it the intent of these regulations to relieve such owners, operators, agents or Masters of vessel from responsibilities or duties now placed upon them by law, regulation or custom."

To all intents and purposes, shipowner has an equal and independent obligation to furnish longshoremen with a reasonably safe place to work and to see that a longshoreman is not exposed to harm. Actually, the Committees' Reports and thus the intent of Congress was not to lessen shipowner's duties owed to longshormen and Congress felt it would increase the safety on board vessels by holding shipowner liable for its negligence.

The very same question as set forth herein was argued in *Landon* v. *Leif Hoegh & Co.*, 521 F.2d 756 (2 Cir. 1975), cert. den. 423 U.S. 1053 (1976). There, in effect, shipowner argued that plaintiff may not recover against shipowner unless he proves the ship's negligence was solely responsible for his injury. The Court rejected this theory for the following reasons:

"First, the draftsmen of Section 5(b), 33 U.S.C. §905(b) could easily have inserted the word 'sole' so that the clause would have read 'caused by the "sole" negligence of the vessel.' Nothing has been called to our attention to indicate such intention. Second, *Congress would hardly have given the ship so little incentive to avoid being negligent toward its longshoremen invitees.* Third, the scheme of the Act is to provide workmen's compensation for a longshoreman from his own employer, but with a right to sue the ship for negligence." (Emphasis supplied)

In no case is any shipowner relieved of liability solely because the stevedore knew of a dangerous condition. Yet *Cox* so holds. Nowhere is shipowner permitted to escape the consequences of its own negligence, yet *Cox* so permits.

Plaintiff here does not claim shipowner to be negligent because the stevedore violated a Safety and Health Regulation. Plaintiff does claim that since shipowner was supposed to supply pins to secure a beam which was part of ship's equipment, but didn't; since shipowner was supposed to supply suitable beam locks, which it didn't; since ship's crew was supposed to insert the pins and to secure the beams which it failed to do, shipowner was negligent. The condition complained of was not created by stevedore in *Cox* and not something that stevedore could abate. They were not furnished with ship's equipment (pins) even though they requested same.

Perhaps more important, the objective of this Act was to encourage safety in a hazardous industry. The one to be protected was the longshoreman who presumably would benefit from improved working conditions. Yet the Court

held in *Cox* that you cannot sue the shipowner for its negligence in creating a dangerous condition and when it is in control of the means of abating same,—because stevedore knows of the dangerous condition.

Thus *Cox* absolves shipowner from liability for its negligence; leaves stevedore with a limited obligation to pay workmens compensation; and makes the longshoreman bear the cost of dangerous conditions not created by him nor within his control and compelling him to assume the risk of his employment so as to relieve shipowner of its liability. Contrary to our sense of social justice, *Cox* finds such result just and not harsh.

In *Napoli*, the court stated:

"As we proceed with our task of adopting appropriate land-based principles of negligence for application under the LAHWCA, we would be lacking in wisdom if we turned our backs on the changes which increased social awareness has brought about in traditional concepts of liability. Accordingly, we believe that where a shipowner has notice of an obviously dangerous condition, his duty of care to longshoremen exposed to such danger should be as set forth in §343A of the Restatement of Torts above quoted." (509)

CONCLUSION

For the foregoing reasons it is respectfully submitted that a Writ of Certiorari should issue to review and reverse the decision below.

Respectfully submitted,

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on Petition

Appendices

UNITED STATES COURT OF APPEALS

No. 424—September Term, 1977.

(Argued December 15, 1977 Decided May 10, 1978.)

Docket No. 77-7338

WALTER COX,

Plaintiff-Appellee,

—against—

FLOTA MERCANTE GRANCOLOMBIANA, S.A.,

Defendant-Appellant.

Before:

LUMBARD, MOORE, and MULLIGAN,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, in the amount of $75,000, entered after a jury trial before Honorable Robert L. Carter, *Judge,* against defendant Flota Mercante Grancolombiana, S.A., under 33 U.S.C. §905(b) of the Longshoremen's and Harbor Workers' Compensation Act.

Judgment reversed; complaint dismissed.

MORRIS CIZNER, Esq., New York, New York (Zimmerman & Zimmerman, of counsel), *for Plaintiff-Appellee.*

THOMAS E. STILES, Esq., New York, New York (Giallorenzi & Stiles, of counsel), *for Defendant-Appellant.*

MOORE, *Circuit Judge:*

Defendant, Flota Mercante Grancolombiana, S.A. ("Flota"), appeals from a judgment against it and in favor of Walter Cox ("Cox"), entered upon a jury verdict in the amount of $75,000, awarded as a result of injuries sustained by him aboard the Ciudad De Cuenca ("Cuenca").

In 1972 the Congress, hopeful of resolving the problems created by court-made law in the field of personal injuries to longshoremen working aboard ships, loading and unloading cargo, enacted the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §901 *et seq.* The purpose of the amendments was to put at rest (as much as they can ever be) the respective rights and liabilities of shipowners, stevedores and the employees of stevedores, engaged by shipowners to handle the cargo loading and unloading operation. As so frequently happens when new statutes appear, and resourceful and imaginative lawyers are available (and they always are), a multitude of cases have been spawned, thus, in this respect, frustrating the intended purpose of the statute.

First, the facts must be stated with some observations believed to be related to the law applicable to them.

Cox, a longshoreman, was employed by Universal Maritime Services ("UMS"), a stevedoring company, which had undertaken by contract to unload cargo from the Cuenca. He was not an employee of the Cuenca.

On March 31, 1975, Cox was working in the hold ("in the very bottom of the ship"). The hatch above him was

open, namely, its cover had been removed. While working, he heard a noise and shortly thereafter was struck by a falling hatch cover which caused his injuries. He did not see the falling hatch cover or know the cause of its fall. As Cox put it "I don't know what happened". (50a).

Vincent Maresca was the foreman on the job for UMS. He defined his duties as follows:

> "The duty of a foreman is to discharge and load the ships and see that everything is safe for the longshoremen to work. And if there isn't I have to tell my hatch bosses, make sure everything is safe, and then I speak to the mate and I tell the mate the same thing." (58a).

When the stevedore went in at 8:00 A.M. to commence unloading he (Maresca) said:

> "I told them [the hatch bosses] to open up the hatches. They get rigged up. I tell them, 'Make sure everything is safe and make sure everything is working right' before they work. And later I tell the mate in charge of the ship, 'Make sure everything is safewise to work'." (62a).

The "[o]pening [of] the hatch is done by the crew. Fixing of the booms is done by the men." (63a). As Maresca looked down into the lower hold, he observed that "[j]ust one end was open". (66a). In the morning he had told his hatch bosses, "When they take off the hatch covers make sure the beams are secured and tell the mate to lock them and put the pins in them". (67a). His hatch bosses told him that "they had the locks in place". (68a). However, Maresca, himself, did not consider the lock in itself to be sufficient to hold the beam in place as a safety measure. (69a). He thought that pins were "[m]uch better than the

locks they got on the beams" (69a), which indicated to him that the beams "should be locked and pinned" because from his experience he knew that on occasion cargo being brought up from the hatch would strike the beams and boards. (70a). The pins and locks belonged to the vessel. He said, "The pins, the seamen have to do that. That isn't our job". (71a). Maresca knew that "the regulations require that no longshoreman is supposed to work until you make sure that these beams are tied down". (80a). Maresca also said that in the afternoon before the accident "I even told my hatch boss, 'Why didn't you put the pins in them?' He says, 'The crew is going to put them in'." (80a). He further testified "I looked and I told the hatch boss again, 'Get the pins in there, get the pins in the beam.' I told the hatch boss again. Then after I told the hatch boss again in the afternoon, the mate, I said, 'Make sure the pins are in'." (84a-85a).

The only other witness was Nicholas Simeone, a hatch boss employed by UMS. Cox was not in his gang. As he described it "there was two gangs that day. One was working in the lower hold and we were in the top deck, in the after end." (90a). Maresca had said to him, "Before you start working make sure the beams are secured", and when he looked he "noticed that the beams were not secured". (92a). The beam was in place and in the slot but "[i]f anything hits it it could fall". (92a). He told a mate several times that the pins were missing and the mate said, "We're going to take care of it". (93a). Simeone did not witness the accident but he saw a beam and hatch covers in the lower hold. On cross-examination he confirmed Maresca's orders saying, "the foreman instructed me to make sure that the beams are secured, you know, see that the beams are secured". (100a). Simeone saw that the beam wasn't secured. "There was no pin in it". (106a).

There was no testimony from any observer as to the cause of the accident, namely, the dislodging and fall of the beam and hatch covers. The closest clue is to be found in Simeone's testimony that "The beam was in place, it was in the slot, but it wasn't—if you just touch it it will come up. If anything hits it it could fall". (92a).

This, in substance, was plaintiff's case against which the shipowner's motion for a directed verdict and post-trial motion must be judged. As a further ground, the shipowner claims error in the charge and the refusal to give various requests which "permitted the jury to find liability on erroneous legal standards." (Appellant's Br. p. 2).

Although in light of the many cases already decided with respect to the 1972 legislation, the law is not undeveloped in this field, the trial judge set as his standard *Napoli* v. *Hellenic Lines*, 536 F.2d 505 (1976), saying: "Napoli is this circuit. I am bound by that, aren't I?" (115a) and later "I am not interested in cases outside the Circuit, and Anuszewski is outside the Second Circuit." (118a).[1]

The trial court's theory of the action was that the shipowner owed a duty to Cox to make sure that during the stevedoring operation the beams on the upper level were pinned. In short, the ship hence was unseaworthy—a theory which might well have been argued before the 1972 LHWCA enactments.

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1 Congress intended that the LHWCA be applied uniformly nationwide. The Committee Reports accompanying the 1972 Amendments state:

"Finally, the Committee does not intend that the negligence remedy authorized in the bill shall be applied differently in different ports depending on the law of the State in which the port may be located. The Committee intends that legal questions which may arise in actions brought under these provisions of the law shall be determined as a matter of Federal law." (emphasis supplied). 3 U.S. Code Cong. & Ad. News 4698, 4705 and S. Rpt. No. 92-1125, 92 Cong., 2d Sess. 12 (1972).

The shipowner on the other hand argues that it is not liable to an employee of an independent contractor for injuries sustained as the result of a dangerous condition, latent or open and obvious, known to and within the control of such a contractor.

Court's and defense counsel's arguments actually are travelling in parallel lines—never to meet. The Court viewed the case as one by a longshoreman vis-a-vis the shipowner; defense counsel as one against the stevedore, who is protected by workmen's compensation and the 1972 Amendments, absent proof the shipowner's negligence as the proximate cause of the accident.

The tendency of the law constantly to look for precedential guidance may be at the root of the problem here, but when Congress, by legislation clearly directed at, and attempting to solve, the unseaworthiness-seamen-longshoremen-*Sieracki-Ryan* problem,[2] has wiped these cases off the judicial slate completely, new writing must be expected to appear. It has.

In this Circuit, the reasons prompting the 1972 legislation, the changes it accomplished and the resulting decisions therefrom cannot be better stated than in the opin-

2 *Seas Shipping Co., Inc.* v. *Sieracki*, 328 U.S. 85 (1946) extended the doctrine of strict liability to seamen to include longshoremen on a theory of unseaworthiness. Later, in *Ryan Stevedoring Co. Inc.* v. *Pan Atlantic S.S. Corp.*, 350 U.S. 124 (1956), the Court held that the shipowner could recover from the stevedore damages for which the shipowner was held liable. This was based on the theory that the stevedore had breached its implied warranty of workmanlike performance to the vessel.

The problems that these decisions created are indicated in the Committee Reports:

> "The Committee heard testimony that the number of third-party actions brought under the *Sieracki* and *Ryan* line of decisions has increased substantially in recent years and that much of the financial resources which could better be utilized to pay improved compensation benefits were now being spent to defray litigation costs." 3 U.S. Code Cong. & Ad. News 4698, 4702 (1972) and S. Rept. No. 92-1125, 92 Cong., 2d Sess. 9 (1972).

ion of Chief Judge Kaufman, in which Judges Lumbard and Van Graafeiland joined, in *Munoz* v. *Flota Merchante Grancolombiana, S.A.*, 553 F.2d 837 (1977).[3] There, after decision on motions for a directed verdict at the close of the plaintiff's case and at the close of trial had been reserved, the case was sent to the jury for a special verdict on six questions. The appeal was from the denial of the motions and to set aside the verdict.

This Court not only reversed but dismissed the complaint, saying, in part:

> ". . . It would, in our view, contravene the clear congressional intent and scheme to approve recovery against Grancolombiana in this case. The shipowner had no duty to supervise the minute details of work totally entrusted to the competence of the stevedore. Indeed, commercial reality and applicable union regulations preclude a rule that would require a non-expert constantly to intrude on the work of a master stevedore in the deepest recesses of the ship.
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> A careful consideration of the testimony below has convinced us that Munoz is barred as a matter of law from recovering damages from Flota Merchante Grancolombiana. Moreover, the appellee has not brought to our attention, either in his brief or at argument, any grounds that would warrant a new trial in the event the verdict is set aside by this court, nor are we of the view that such relief would be appropriate. . . ." *Munoz* v. *Flota Merchante Grancolombiana, S.A.*, 553 F.2d 837, at 840-841 (1977).

3 At the time of trial, the trial judge did not have the benefit of the *Munoz* decision.

Following *Munoz* some three months later, this court had a somewhat similar appeal in *Ruffino* v. *Scindia Steam Navigation Co., Ltd.*, 559 F.2d 861, which affirmed the dismissal of the complaint and the grant of the motion for judgment n.o.v. Judge Van Graafeiland for the Court said:

> "In enacting the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq.*, Congress intended to relieve shipowners of liability predicated upon the negligence of stevedoring companies. *Napoli* v. *Hellenic Lines, Inc.*, 536 F.2d 505, 507 (2d Cir. 1976). After the amendment, Congress said, the vessel would be liable only for its own failure to use reasonable care, *Munoz* v. *Flota Merchante Grancolombiana, S.A.*, 553 F.2d 837, 840 (2d Cir. 1977) which would be determined in accordance with land-based principles of negligence. *Napoli, supra* at 507." *Id.* at 862.

(*Napoli* presented a state of facts where the shipowner also acted as its own stevedore.)

It makes no difference here whether the alleged defect was latent or open and obvious.[4] In either case, the situation was known to the stevedore. The stevedore from its inception had complete charge of the unloading operation.

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4 After a comprehensive analysis of post-1972 Amendments cases in this field in this and other circuits, Judge Gottel rejected the distinction between latent and obvious defects in two recent cases. Laying the primary safety responsibility on the stevedore, he found no liability where the shipowner did not have actual knowledge of possible unseaworthy conditions which arose after the stevedore began operations. *Espinosa* v. *United States Lines, Inc.*, 444 F.Supp. 405 (S.D.N.Y. 1978) (judgment n.o.v.); *Silverio* v. *Koninklijke Nederl. Stomb. Maats.*, 444 F.Supp. 415 (S.D.N.Y. 1978) (complaint dismissed). Similarly this circuit has recently found that "[t]he dichotomy of latent and obvious defects referred to in the cases is not always controlling or pertinent in determining the liability of the shipowner." *Hickman* v. *Jugoslavenska Linijska Plovidba Rijeka, "Zvir"*, 570 F.2d 449 (2d Cir. 1978).

Only it could give orders to its employees. As said in *Munoz* (same stevedore, UMS; same shipowner, Flota), "Moreover, union regulations forbade crew members from assuming any role in the enterprise". 553 F.2d at 840. If the beam was dislodged by cargo being hoisted out of the hold (as has been suggested as the only possibility), then the cause of the accident was an operation entirely in the hands of the stevedore. It was the stevedore which had exclusive control of the gangs and how, when and where they worked.

This case is quite different on its facts from *Lubrano* v. *Royal Netherlands Steamship Company*, No. 77-7211, slip op. 1533 (2d Cir. February 15, 1978). In *Lubrano*, this court reversed a directed verdict and remanded for a new trial an action brought against a shipowner by a longshoreman who had slipped and injured himself while loading slippery drums of tallow. The shipowner, which had a contractual duty to supply dunnage, sought additional dunnage when requested to do so, but plaintiff was injured before the dunnage arrived. The majority opinion determined that in spite of the "ambiguous and unimpressive" evidence, "it was enough to allow a jury to conclude that the ship's officer approved and joined in the direction [of the stevedore] that the men keep working, although the dunnage was not there". *Id.* at 1538. The majority determined that "if there is again evidence that a ship's officer, after being notified of the open and obvious danger of insufficient dunnage for a slippery cargo, had the men keep working or joined in the stevedore's decision to do so, then there would be a jury question". (footnote omitted). *Id.* at 1539. Here there is no indication that the shipowner took any affirmative action to instruct the longshoremen to continue work without the beams being secure, or that he joined in the decision to do so. Likewise there

is no indication that the shipowner attempted to remove any part of the loading operation from the control of the stevedore.

This case is more similar to *Hickman* v. *Jugoslavenska Linijska Plovidba Rijeka, "Zvir"*, 570 F.2d 449 (2d Cir. 1978), where this court reversed a jury verdict entered in favor of a plaintiff-longshoreman who was suing the shipowner after he was injured when his foot slipped between bales of rags which he was loading. The longshoreman had complained earlier about a lack of dunnage to the ship's mate, who directed the longshoreman to the location of the dunnage, but the dunnage was insufficient, and he did not ask for more although other dunnage was available. The court determined that the ship did not have a duty as a matter of law to supply dunnage, and "[s]ince the loading operation was not under the control of the shipowner, the mate had no right to interfere with the loading by going down the hatch himself and placing additional dunnage on the bales". *Id.* at 452. Like *Hickman*, here the responsibility for the safety of the longshoreman was on the stevedore and it had the responsibility to ensure the pins were in place.

The reasons for and the legislative history behind the 1972 Amendments have been rather fully stated in the Third Circuit in *Hurst* v. *Triad Shipping Company*, 554 F.2d 1237 (3rd Cir. 1977), *cert. denied*, 46 U.S.L.W. 3208 (1977). That court reaffirmed Judge Van Dusen's statement in his opinion in *Brown* v. *Ivarans Rederi A/S*, 545 F.2d 854 (3rd Cir. 1976) that

> "[E]xpress language in the statute and the legislative reports accompanying the 1972 Amendments amply demonstrate that the major responsibility for the proper and safe conduct of the work was to be borne by the stevedore." (footnote omitted). *Id.* at 860.

In the Fourth Circuit in a case factually almost identical to the case at hand, *Anuszewski* v. *Dynamic Mariners Corp. Panama*, 391 F.Supp. 1143 (D. Md. 1975), the District Judge entered judgment for the defendant, the facts having disclosed the existence of beams known to the stevedore to have been unpinned. The judge, after noting that the primary duty under 29 C.F.R. §1918.43(e) (Safety and Health Regulations for Longshoring) with respect to the beams was on the stevedore and that the shipowner should have known of the violation of the regulation, said, "But that negligence on the part of the ship is not actionable negligence in a post-1972 setting, for reasons which are discussed infra." *Id.* at 1145. This, he said, before the 1972 Amendments "would seemingly have constituted unseaworthiness". *Id.* at 1146. After reviewing some eight post-1972 decisions that land-based principles applied, referring particularly to §§343 and 343A of the Restatement (Second) of Torts, he concluded that "in the context of the facts in this case settled principles of land-based tort law do not impose liability in favor of the employees of an independent contractor for the open and obvious negligence of the person in control of the premises upon which those employees are at work." *Id.* at 1149. On appeal, the Court of Appeals affirmed, 540 F.2d 757 (1976), *cert. denied*, 429 U.S. 1098 (1977), saying that the District Judge's conclusions were "in accord with the decisions of the several courts who have had occasion to consider the 1973 [sic] Amendments." (citations omitted). *Id.* at 759.

Most recently that court in *Riddle* v. *Exxon Transportation Co.*, 563 F.2d 1103 (4th Cir. 1977) had occasion to review a judgment entered upon a jury verdict in favor of the defendant (an independent contractor) and stated:

"In both [*Anuszewski, supra,* and *Bess* v. *Agromar Line,* 518 F.2d 738 (4th Cir. 1975)], we held, in keeping with the manifest legislative purpose, that the Amendments were intended to and did relieve the shipowner of a nondelegable duty to furnish a safe place to work and declared that its liability in a third-party action, in which the stevedore or ship repairer was 'viewed generally as an independent contractor,' was governed by 'land-based' negligence principles and not by 'maritime negligence concepts'." *Id.* at 1110.

The Fifth Circuit, in consolidated appeals *Gay* and *Guerra Gay* v. *Ocean Transport & Trading, Ltd.,* 546 F.2d 1233 (1977)), considered at length the effect of the 1972 Amendments and, after citing a host of cases in their and other circuits, including the Second and Fourth, concluded that "[s]ection 905(b) instructs that a longshoreman does not have a cause of action against a vessel if his injury 'was caused by the negligence of persons engaged in providing stevedoring services to the vessel,'" *Id.* at 1239-40, and affirmed summary judgment in favor of the shipowner and against Gay. In *Guerra* (possibly as here) a wire attached to a beam snagged on a pallet causing it to fall into the hold, thus injuring Guerra. This operation was under the control of the stevedore. Judgment in favor of the shipowner was affirmed.

It is this case to which Chief Judge Kaufman referred when he wrote:

"We therefore prefer [obviously to *Napoli*] the guidance afforded by *Gay* v. *Ocean Transport & Trading,* 546 F.2d 1233 (5th Cir. 1977) where, in two related cases, the Fifth Circuit refused to hold a shipowner liable for injuries sustained by longshoremen as a direct result of their employers' negligence in failing

properly to ventilate the hold and omitting adequately to secure pallets on the ship's deck. The court recognized, as we do, that it would be inimical to the intent of Congress to charge the shipowner with the stevedore's wrong. . . ." (citations omitted) *Munoz* v. *Flota Merchante Grancolombiana, S.A.,* 553 F.2d 873 at 841.

It makes no difference in this, the *Cox* case, whether the defect was latent or open and obvious. In either situation, the potential danger was known to UMS.

Following *Gay,* the Fifth Circuit in *Brown* v. *Mitsubishi Shintaku Ginko,* 550 F.2d 331 (5th Cir. 1977), in affirming a summary judgment in favor of the shipowner and against the injured longshoreman, said, "[T]here could be no duty owed by the ship to Brown as a matter of law, even if the ship's crew was aware of the danger posed by the unstable rack". *Id.* at 335.

In view of the law as declared in at least the four circuits herein cited with respect to the changes in the law effected by the 1972 LHWCA enactments and in view of the facts presented in plaintiff's case, the motion for a directed verdict in defendant's favor should have been granted. The stevedore alone had been entrusted with the unloading operation. It knew the location of its employees in the hold; the work being done by the gang above in the 'tween deck area; the necessity, as shown by its directions to the hatch bosses, that the beams be secured and that they were not secured. In addition, the operation of the boom was in its exclusive control and if, as undoubtedly occurred, some object, probably cargo, struck and dislodged the beam, this was the stevedore's act—not that of the shipowner. In view of the overwhelming decisional authority and the conclusion therefrom that the shipowner had no duty to supervise the operation entrusted to the stevedore

alone, the judgment must be reversed and the complaint dismissed.[5]

This result does not impose a hardship or injustice on the injured longshoreman. He receives the substantial[6] benefits intended to be accorded to him by the 1972 legislation. The entire philosophy of workmen's compensation would be thwarted by a contrary result.

Although a situation is here presented similar to that in *Munoz* and *Hickman*, where this court reversed and dismissed the complaint in each case, brief comment should be made with respect to the trial court's charge and the error claimed therein. The trial court charged:

> "If you find that because of the untied beams the plaintiff did not have a reasonably safe place in which to work and that the ship's officers knew or in the exercise of reasonable care should have known of the unsafe condition, yet failed to take reasonable steps to correct it, then you should find the defendant liable.
>
> Additionally, if you find that the plaintiff did not have a reasonably safe place in which to work, even if you find that the plaintiff or his employer knew of the danger facing him because of the untied beams, or that the danger was obvious to him, you must still find for the plaintiff if you find that the defendant should have anticipated that an accident might occur with the beams not tied down, despite such knowledge on the

5 In a New York case, brought by a co-worker of Cox, arising out of the same incident, the State Supreme Court dismissed the complaint based in part on *Anuszewski*, distinguishing *Napoli*. The Appellate Division, First Department affirmed without opinion. *Williams* v. *Flota Mercante Grancolombiana, S.A.*, No. 1465 (1st Dept. December 20, 1977).

6 In Appellant's brief (p. 20) it is represented that "Whereas, prior to the amendment, the longshoremen received a maximum of $70.00 per week in compensation, today the maximum is more than $350.00 per week".

> part of the plaintiff and despite the obviousness of the danger to him." (162a).

This charge, in effect, was merely a reiteration of the pre-1972 law which imposed on the shipowner a non-delegable duty to provide the employees of an independent contractor with a safe place to work.[7] It was exactly this legal principle which Congress intentionally changed.

Judgment reversed; complaint dismissed.

7 Appellant requested two charges to the jury which were erroneously denied. (146a). He requested, in request 18, that the shipowner would not be responsible if the plaintiff or his fellow workers were negligent in failing to take adequate precautions to prevent the accident (189a) and in request 21, that the shipowner Flota had no duty to supervise the work of the stevedore UMS. (190a-91a).

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 346, 488—September Term, 1977.

(Argued December 8, 1977 Decided June 2, 1978.)

Docket Nos. 77-7292, 77-7332

ANTHONY CANIZZO,

Plaintiff-Appellee and Cross-Appellant,

v.

FARRELL LINES, INC.,

Defendant-Appellant and Cross-Appellee,

and

UNIVERSAL TERMINAL AND STEVEDORING CORP.,

Defendant-Appellee and Third Party Plaintiff,

FARRELL LINES, INC.,

Third Party Plaintiff-Appellant,

v.

FRANK J. HOLLERAN, INC.,

Third Party Defendant-Appellee.

Before:

FRIENDLY, SMITH and MESKILL,

Circuit Judges.

Appeal from money judgment for personal injuries to longshoreman against shipowner in the United States District Court for the Southern District of New York, Charles L. Brieant, Jr., *Judge.*

Affirmed in part, reversed in part and remanded for further proceedings.

JEFFREY V. BOXER (Lilly, Sullivan & Purcell, New York, N.Y.), *for Farrell Lines, Inc.*

RICHARD J. CARDALI (Cohen & Cardali, New York, N.Y.), *for Anthony Canizzo.*

ALBERT S. COMMETTE (Commette, Quencer & Annunziato, New York, N.Y., Robert K. Marzik, of counsel), *for Universal Terminal and Stevedoring Corp.*

JOHN T. SHEAN, New York, N.Y. (J. Robert Morris, New York, N.Y., of counsel), *for Frank J. Holleran, Inc.*

SMITH, *Circuit Judge:*

Farrell Lines, Inc. ("Farrell") appeals from a decision and order of the United States District Court for the Southern District of New York, Charles L. Brieant, Jr., *Judge,* finding Farrell liable for injuries sustained by appellee Anthony Canizzo in an accident on board Farrell's ship, the S.S. African Comet. The court found Farrell liable for damages in the net amount of $65,628.60, after a deduction which included $8500 per year for re-

maining earning ability and 40% contributory negligence, and Canizzo cross-appeals from this reduction in the damage award.

For the reasons adduced below, we affirm in part and reverse in part the judgment of the district court and remand the case for further proceedings consistent with this opinion.

I.

This suit commenced with the filing of a complaint against Farrell and Universal Terminal and Stevedoring Corp. ("Universal"), an independent stevedore loading cargo on board the African Comet on the day of the accident. Farrell impleaded Frank J. Holleran, Inc., Canizzo's employer, as a third-party defendant, and filed a cross-claim against Universal. Universal then filed a cross-claim against Holleran. The district court dismissed Canizzo's action against Universal, Farrell's cross-claim against Universal, Farrell's third party complaint against Holleran and Universal's cross-claim against Holleran.

On January 12, 1973, the day of the accident, Universal was employed by Farrell to load the African Comet. Holleran provided lashing and carpentry personnel to secure the cargo after it was loaded by Universal. Canizzo worked for Holleran as a carpenter. At approximately 5:00 p.m. Canizzo was instructed to move from one part of the ship to another in order to continue his work. In so doing, he was forced to traverse a narrow passageway between a locomotive stowed on the inshore area of the deck and a nearby hatch coaming. While walking through this passageway, Canizzo slipped on a patch of grease which was partially covered by a pile of wires which lay on the deck. Canizzo sustained permanent injury to his knee, and as a result, is unable to work as a marine carpenter or longshoreman. He is not, however, totally disabled.

The trial court found that the ship's crew placed cluster lights and their attached electrical wires in the passageway in question after 4:00 or 4:30 p.m., but at least one-half an hour before Canizzo's accident. The lights, wires, and other clutter which lay on top of the greasy deck created an "obviously dangerous" condition which would have been obvious to any prudent person. The court found that Farrell had actual or constructive notice of this condition inasmuch as the ship's personnel should have seen the grease on the deck when they put out the cluster lights. Furthermore, the crew should have anticipated that Canizzo would be unable to avoid the dangerous condition on the deck. This, the district court believed, was sufficient to bring Farrell within the negligence standard of § 343A of the Restatement (Second) of Torts (1965),[1] which was adopted in this court's opinion in *Napoli* v. *Trans Pacific Carriers Corp.*, 536 F.2d 505 (2d Cir. 1976).

The court found further, however, that Canizzo had been contributorily negligent in failing to walk with sufficient caution, or alternatively, in failing to avoid the wires by taking a different route to the No. 6 hatch. It was further held that Canizzo's damages were reduced, inasmuch as he was capable of earning $8500 per year. Accordingly, the trial court awarded Canizzo $109,381.00 reduced by reason of contributory negligence to $65,628.60.

II.

This suit is brought pursuant to the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"), 33

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1 Section 343A provides:

> (1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.
>
> . . .

U.S.C. § 901 *et seq.*, as amended. Amendments to the Act passed in 1972 increased levels of compensation payable to injured longshoremen, eliminated the doctrine of unseaworthiness as it pertained to shipowners, made a shipowner's negligence a necessary condition of his liability, and immunized independent stevedore-employers from liability in excess of compensation payments. In the words of the House Report:

> The Committee believes that where a longshoreman or other worker covered under this Act is injured through the fault of the vessel, the vessel should be liable for damages as a third party, just as land-based third parties in non-maritime pursuits are liable for damages when, through their fault, a worker is injured.
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> . . .
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> [But] the Committee believes that especially with the vast improvement in compensation benefits which the bill would provide, there is no compelling reason to continue to require vessels to assume what amounts to absolute liability for injuries which occur to longshoremen . . . who are injured while working on those vessels.
>
> . . .
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> Accordingly . . . it would be fairer to all concerned . . . for the liability of vessels as third parties to be predicated on negligence, rather than the no-fault concept of seaworthiness.
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> [Report of the House Education and Labor Committee, H.R. Rep. No. 92-1441, 92nd Cong., 2d Sess., 1972, U.S. Code Cong. & Ad. News, 4698 at 4702-03.]

See *Lubrano* v. *Royal Netherlands Steamship Co.*, —— F.2d —— slip op. 1533 (2d Cir., Feb. 15, 1978); *Ruffino* v. *Scindia Steam Navigation Co.*, 559 F.2d 861 (2d Cir. 1977); *Munoz* v. *Flota Merchante Grancolombiana, S.A.*, 553 F.2d

837 (2d Cir. 1977); *Napoli* v. *TransPacific Carriers Corp.*, *supra*, 536 F.2d 505; *Landon* v. *Lief Hoegh & Co.*, 521 F.2d 756 (2d Cir. 1975), *cert. denied*, 423 U.S. 1053 (1976).

Under the relevant provisions of the Restatement (Second) of Torts (1965), possessors of land, and hence shipowners, are liable for physical harm caused to invitees by dangerous conditions which are not obvious to the invitee (§ 343), but are absolved from liability when dangerous conditions are known or obvious, except when the possessor should anticipate the harm despite the invitee's knowledge or the obviousness of the condition. (§ 343A.)

Thus in *Napoli, supra,* we held that where a longshoreman had fallen from unsecured planks, there was sufficient evidence of the shipowner's knowledge of "obviously dangerous conditions" that were unlikely to be avoided by the longshoreman, that the case should have gone to a jury for a determination of the shipowner's negligence under § 343A of the Restatement (Second) of Torts. 536 F.2d 505.

A shipowner, however, can only be liable under § 343A if he knows or should have known of the obviously dangerous, but unavoidable, condition. *Ruffino* v. *Scindia Steam Navigation Co., supra,* 559 F.2d at 862; *Munoz* v. *Flota Merchante Grancolombiana, S.A., supra,* 553 F.2d 837.

While these principles are reasonably clear, considerable legal uncertainty remains in cases in which the negligence of a shipowner combines with the negligence of an independent stevedore to cause injury to a longshoreman. Similarly, when harm is caused by an independent stevedore given complete control over the loading of a ship, it is unclear whether, everything being equal, a shipowner is liable for that harm even when he has knowledge of the dangerous condition caused by the stevedore. See Restatement (Second) of Torts, §§ 409-429; *Lubrano* v. *Royal Netherlands Steamship Co., supra,* slip op. 1533 at 1539

(Moore, *J.*, dissenting); *Hickman* v. *Jugoslavenska Linijska Plovidba Rijeka, "Zvir"*, —— F.2d ——, slip op. 1459 (2d Cir., Feb. 2, 1978).

Too strict a view of a shipowner's liability in these situations would do much to diminish the salutary effects of the 1972 amendments by, in effect, making shipowners liable, once again, on what is akin to an unseaworthiness standard, but without recourse to contribution on the part of a negligent stevedore. Too lax a view would specifically contradict the congressional intention to make shipowners liable for their own negligence under the amended statute. See Report of the House Education and Labor Committee, H.R. Rep. No. 92-1441, *supra*, at 4701-02. We are faced, then, with a difficult problem of line drawing which, at this stage in the development of the legal doctrine, is best undertaken on a case by case basis.

In the instant case, the trial court found Farrell liable on either of two alternative legal theories. First, it found that the ship's crew placed cluster light wires on top of a patch of grease, thereby creating the dangerous condition which was the proximate cause of Canizzo's injury. Second, it found that, in placing the cluster lights on the deck, the crew observed or should have observed the greasy patch, and was therefore on notice of the obviously unsafe condition aboard ship.

These findings rest on the trial court's assessment of the credibility of plaintiff and of two of plaintiff's witnesses, Mazze and Trovato, both of whom were fellow employees and friends of plaintiff and both of whom had unrelated injury claims pending. The court found both biased in plaintiff's favor and rejected portions of the testimony of each, notably that of Trovato that a ship's officer had observed the dangerous conditions at 1:00 or 2:00 p.m. The court did, however, credit the testimony that the

grease, wire and cluster light wires existed in the area of the accident, that the grease was there at 1:30 or 2:00, and that the cluster lights had been placed on deck by the ship's company.[2]

These conclusions are based primarily on the weighing of testimony by the trier who had the opportunity to observe witnesses Mazze and Trovato on the stand and listen to them under direct and cross-examination, and we find no basis for setting them aside. The existence of a substantial area of grease in a narrow passageway, which should have been known to the ship's personnel, made more dangerous by the positioning by the ship's personnel of the cluster lights and wires upon the greasy area supports the finding of negligence on the part of the ship and justifies the plaintiff's judgment even under the new dispensation.

There is a strong presumption in favor of a trial court's findings of fact if supported by substantial evidence, *Pampillonia* v. *Concord Line, A/S*, 536 F.2d 476 (2d Cir. 1976), *Luigi Serra, Inc.* v. *SS Francesco C*, 379 F.2d 540 (2d Cir. 1967) (maritime negligence). Such findings may be set aside only if clearly erroneous. Rule 52(a), Fed. R. Civ. P. Where no substantial evidence supports a factual deter-

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2 While the testimony concerning the cluster lights is to some degree vague and inconsistent, there is some substantial basis for the court to conclude that it was more probable than not that the crew put them out. The longshoremen had often worked this ship and were familiar with its lighting. Trovato testified that "they" put two lights near every hatch and that the ship owns the cluster lights, Canizzo that the crew takes care of them, Dennen (a Farrell witness by deposition) testified that they are owned by the ship, are ship's gear, are stowed adjacent to the hatch, are made available and are available to where they are needed. Holleran indicated hat they were ship's gear but usually hooked up by longshoremen. Davis, a ship superintendent for Universal, by deposition testified that the crew puts the cluster lights out and brings them to the hatch but that either the crew or Universal's men plug them in. There is no indication that the cluster lights in question had yet been hooked up.

mination, it is clearly erroneous, and properly set aside. *United States ex rel. Paxos* v. *Rundle*, 491 F.2d 447, 452 (3d Cir. 1974); *Hodgson* v. *Fairmont Supply Co.*, 454 F.2d 490, 495 (4th Cir. 1972); *Shenker* v. *United States*, 322 F.2d 622, 624 (2d Cir.), *cert. denied sub nom. American Stevedores, Inc.* v. *Shenker*, 376 U.S. 907 (1963); *Apache Powder Co.* v. *Ashton Co.*, 264 F.2d 417, 422 (9th Cir. 1959); *Cleo Syrup Corp.* v. *Coca-Cola Co.*, 139 F.2d 416, 418 (8th Cir. 1943), *cert. denied*, 321 U.S. 781 (1944); see 5A *Moore's Federal Practice* ¶ 52.03[1]; 9 Wright & Miller, *Federal Practice & Procedure* § 2585 n. 8.

Here the question is not so much whether the evidence supporting the findings on liability is substantial as whether it is credible. We are not convinced that the determination of credibility is clearly erroneous, although a contrary ruling might have been supportable.

The judgment establishing the ship's liability must be affirmed.[3]

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3 *Cox* v. *Flota Mercante Grancolombiana, S.A.* was decided May 10, 1978, slip op. 2989ff, while this case was sub judice. *Cox* seems to us in conflict with at least *Lubrano* v. *Royal Netherlands S.S. Co.*, —— F.2d ——, slip op. 1533 (2d Cir. Feb. 15, 1978), among the decisions in this circuit.

While each case must be determined on its own facts, the result in *Cox* cannot reasonably be reconciled with our result here by the differences in the factual situations, for the proof of ship's negligence in *Cox* was at least comparable to that here. With all respect, however, we must disagree with the result in *Cox*. It appears to us to do what the Congress was unwilling to do, abolish the shipowner's liability to the injured longshoreman in negligence as well as in unseaworthiness. As Judge Friendly points out, liability of the ship for such negligence as a greasy deck attributable to the ship's company was specifically contemplated and thought to be preserved by the legislation.

Litigation in this troubled field would be tidier if the Congress had eliminated altogether the ship's possible liability to longshoremen. There are, however, other considerations.

Benefits under the Longshoremen's and Harbor Workers' Act have been considerably increased. We cannot overlook the fact, however, that as is usual under workmen's compensation schemes, they do not fully compensate for the loss suffered. If the ship, not a party to the employment contract, is absolved from liability for its own negligence, this uncompensated loss, which may be very great, is shifted from the negligent ship to the often innocent employee. The terms of the statute and the legislative history indicate to us that while Congress was willing to shift the burden of injury without fault to an improved compensation system for shore workers (who arguably never should have been classified with seamen anyway) it was not willing so to shift the burden of injury through the fault of the ship. This policy judgment we would leave to the Congress.

III.

The trial court found that because of Canizzo's experience as a carpenter and his above-average intelligence, he was capable of earning $8500 per year. While we do not quarrel with the court's estimation of Canizzo's intelligence, we are forced to conclude that it has taken an unfounded view of the employment potential of a 58-year-old, partially-disabled marine carpenter who has a history of heart trouble. While Canizzo may be capable of some employment, the record lacks any evidence as to its nature, availability or rate of compensation. The finding that he can earn $8500 per year until his retirement leaves this court "with the definite and firm conviction that a mistake has been committed" and that this finding is consequently clearly erroneous. *United States* v. *U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948); *Schley* v. *CIR*, 375 F.2d 747, 749-50 (2d Cir. 1967); Rule 52(a), Fed. R. Civ. P.

Accordingly, we must remand this case for redetermination of Canizzo's damages.

The court's dismissal of charges against Universal for failure of proof of Universal's negligence, and its dismissal of charges against Holleran, as forbidden by the terms of 33 U.S.C. § 901 *et seq.*, as amended, were correct.

The judgment of the district court is affirmed on the issue of liability, reversed on the issue of damages, and the case is remanded for further proceedings consistent with this opinion.

FRIENDLY, *Circuit Judge*, dissenting from the holding as to liability:

Courts must be exceedingly careful in defining the contours of the longshoreman's action for negligence against the ship, which was preserved by § 905(b) of the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), lest too expansive notions of the ship's duty vitiate Congress' intent to do away with absolute liability for vessels (the "unseaworthiness" doctrine) and make greatly improved compensation benefits the primary remedy for longshoremen and harbor workers. Congress' objective, as is well known, was to curtail the triangular action whereby a longshoreman[1] who had already received compensation benefits from his employer[2] would bring a suit for unseaworthiness against the ship, which in turn would sue the employer. See *Munoz* v. *Flota Merchante Grancolombiana, SA*, 553 F.2d 837, 839-40 (2 Cir. 1977). Much of any recovery by the longshoreman would return to his employer's compensation insurer in satisfaction of its lien; another substantial portion would go to the plaintiff's lawyer and medical experts; and there would be a further transactional cost in the ship's recovery from the employer of its cost of defending against the longshoreman's suit. See, e.g., *McLaughlin* v. *Trelleborgs Angfartygs A/B*, 408 F.2d 1334 (2 Cir.), *cert. denied*, 395 U.S. 946 (1969). Unless the courts keep the longshoreman's negligence action against the ship within proper

1 For simplicity I shall generally use the word "longshoreman" to include all persons covered by the Longshoremen's and Harbor Workers' Compensation Act, and the word "stevedore" to include their employers, although plaintiff Canizzo was a marine carpenter. Cf. 33 U.S.C. § 902 (3) and (4).

2 Before the 1972 amendments these were often inadequate, see *Munoz* v. *Flota Merchante Grancolombiana, S.A.*, 553 F.2d 837, 839 (2 Cir. 1977).

bounds, the ship's situation will be worse in some respects than before since it will be deprived of its former third party action against the longshoreman's employer. Moreover, the increased compensation payments, which Congress conceived as the usual source of making the longshoreman whole, will absorb a still larger share of his recovery against the ship with consequent attenuation of any benefit to the injured worker. And all this despite the fact that the employer is generally in a far better position than the ship to prevent accidents to its employees. See *Lubrano* v. *Royal Netherlands S.S. Co.*, slip ops. 1533, 1546-47 & n. 7 (2 Cir. Docket No. 77-7211, Feb. 15, 1978) (Moore, *J.*, dissenting). Such a result would contravene the objective of Congress whereby

> . . . adequate workmen's compensation benefits . . . by assuring that the employer bears the cost of unsafe conditions, serves [sic] to strengthen the employer's incentive to provide the fullest measure of on-the-job safety.

H.R. Rep. No. 1441, 92d Cong., 2d Sess. (1972), *reprinted in* 3 U.S. Code, Cong. & Ad. News 4698, 4699 (1972).[3] Nothing in the language of the statute or prior decisions of this court or others can justify imposition of liability on the ship under such circumstances as are presented here.

In retrospect it seems to have been a mistake for courts to give such talismanic significance to §§ 343 and 343A of the Restatement of Torts 2d as has sometimes been done. These sections are awkwardly drafted;[4] the framers had

3 Identical language appears in the Senate Report, No. 92-1125, 92d Cong., 2d Sess. 2 (1972).

4 Section 343A, on which liability is here sought to be predicated, is a statement of when the possessor is *not* liable.

no notion that they would be applied to the tangled situations of ship loading or unloading; and they must be read together with Chapter 15, "Liability of an Employer of an Independent Contractor". In dealing with § 905(b), courts would do better to consider the policies that actuated Congress in adopting the 1972 amendments. In my view Congress did not mean to subject the ship to liability for every dangerous condition known or knowable to it when it had a right to assume that this would be remedied by the employer, as § 941(a) requires. The typical cases where the ship was to be liable under § 905(b) would be for conditions of which it was or should have been aware but of which the employer was not and could not reasonably be expected to be and for affirmative acts of negligence for which the employer bore no responsibility (e.g., when the crew carelessly operated the ship's machinery used in loading and unloading or when such machinery was defective).[5]

Decisions in other circuits have emphasized the primary responsibility of the employer and the right of the vessel to assume that this will be discharged. The Third Circuit

5 This view does not run counter to the case stated in the House Report:

> So, for example, where a longshoreman slips on an oil spill on a vessel's deck and is injured, the proposed amendments to Section 5 would still permit an action against the vessel for negligence. To recover he must establish that: 1) the vessel put the foreign substance on the deck, or knew that it was there, and willfully or negligently failed to remove it; or 2) the foreign substance had been on the deck for such a period of time that it should have been discovered and removed by the vessel in the exercise of reasonable care by the vessel under the circumstances.

H.R. Rep. No. 1441, *supra*, 3 U.S. Code Cong. and Ad. News at 4704 (1972). The crucial words are "willfully and negligently" and "in the exercise of reasonable care." Reasonable care does not require the ship to act if it could properly expect that the contractors who were constantly coming and going in the area would do so. See *Anuszewski* v. *Dynamic Mariners Corp., Panama*, 391 F.Supp. 1143, 1149 (D. Md. 1975), *aff'd*, 540 F.2d 757 (4 Cir. 1976), *cert. denied*, 45 U.S. 3571 (1977).

disapproved a jury instruction that "[t]he responsibility for the safety of the longshoreman lies concurrently or jointly with the longshoreman's employer, and with the shipowner." *Marant* v. *Farrell Lines, Inc.*, 550 F.2d 142 (3 Cir. 1977). Later, in *Hurst* v. *Triad Shipping Co.*, 554 F.2d 1237, 1250 n.35 (3 Cir.), *cert. denied*, 46 U.S.L.W. 3218 (1977), Judge Hunter noted that

> creation of a shipowner's duty to oversee the stevedore's activity and insure the safety of the longshoremen would . . . saddle the shipowner with precisely the sort of nondelegable duty that Congress sought to eliminate by amending section 905(b). Every shipowner has the authority to oversee stevedoring operations. If that authority, without more, suffices to charge the shipowner with a responsibility for detecting unsafe methods of operations and warning the longshoremen about them, then shipowners will be back in their pre-1972 position.

The Fourth Circuit has taken a similar view. It approved a jury instruction that the primary responsibility for the safety of a repairman on a ship rested upon the shipyard and not upon the shipowner. *Riddle* v. *Exxon Transportation Co.*, 563 F.2d 1103, 1109 (1977).[6] After noting the

6 In support of this the court stated in footnote 9:

> See, for instance, *Ramirez* v. *Toko Kaiun K.K.* (N.D. Cal. 1974) 385 F.Supp. 644, 653; *Lucas* v. *"Brinknes" Schiffahrts Ges.* (E.D. Pa. 1974) 379 F.Supp. 759, 768.
>
> In the first case, the Court said:
>
> "The primary responsibility for the safety of a longshoreman lies with the stevedoring company."
>
> In *Lucas*, the Court said:
>
> "* * * It is clear, however, that Congress decided that the primary duty to provide a safe place to work is on the stevedore."
>
> In *Brown* v. *Ivarans Rederi A/S* (3d Cir. 1976) 545 F.2d 854, 860 (U.S. appeal pending), the Court said:

"modern" rule of a landowner's liability set forth in §§ 343 and 343A of Torts Restatement and applied by this court in *Napoli* v. *TransPacific Carriers Corporation*, 536 F.2d 505 (1976), Judge Russell went on to say:

> However, even under the modern rule, a vessel is not liable for "open and obvious" dangerous conditions, whether existing at time control of the vessel is relinquished by the vessel or arising afterwards with the knowledge of the vessel, *if the danger is such that the stevedore or shipyard would be expected to correct the condition in the course of discharging its responsibility for the safety of the longshoreman or shipyard worker.*

563 F.2d at 1111-12 (emphasis added). One author has written:

> The consistent philosophy of these decisions is that in the ordinary situation shipowners are in no position to learn of unsafe conditions or methods arising during the stevedore's operations; when the shipowners do learn of such dangers, ordinarily the stevedore and his employees will have an equal or greater awareness, so that the danger can be said to be open and obvious; and that the safety of stevedoring and other such operations is the primary and usually the sole responsibility of the stevedore.

Robertson, *Negligence Actions by Longshoremen Against Shipowners Under the 1972 Amendments to the Longshore-*

"* * * However, express language in the statute and the legislative history reports accompanying the 1972 Amendments amply demonstrate that for reasons of policy the major responsibility for the proper and safe conduct of the work was to be borne by the stevedore.

563 F.2d at 1109 n. 9.

men's and Harbor Workers' Compensation Act, 7 Journ. Maritime Law & Commerce 447, 473 (1976).

No decision of this court requires us to ignore the ship's justifiable reliance on the independent contractors to perform their duty. *Napoli* v. *TransPacific Carriers Corp.*, *supra*, 536 F.2d 505, which the district judge regarded as the *fons et origo* of imposition of broad liability on the ship, did nothing of the kind. Where, as in that case, there is no independent contractor, it *is* part of the ship's duty to exercise reasonable care to inspect its own workers' workplace, to remove grease spills, etc. In such a case there is no "independent contractor" with primary responsibility upon whom the ship may properly rely. As the *Napoli* court rightly said in rejecting the district court's charge in that case:

> a charge which relieves a shipowner of liability for a dangerous condition which was "known to the stevedore or to any of its employees" is clearly inappropriate where the shipowner, itself, is the stevedore.

Napoli, supra at 508. Things are very different when the longshoreman works for an independent stevedore who has primary responsibility for the workplace. The decision of a divided panel in *Lubrano* v. *Royal Netherlands S.S. Co.*, *supra*, slip ops. 1533, is also distinguishable. In that case there was evidence of direct knowledge and participation of a ship's officer who "approved and joined in the direction that the men keep working, although the dunnage was not there." It was not a case where either the ship did not actually know of the danger and merely "should" have known, nor a case where at most the ship knew of the problem but could rely on others to alleviate it—in *Lubrano* the

court found that the ship's officer may have himself ordered the continuance of the dangerous situation.

In contrast this court has repeatedly recognized how far the ship may rely upon the independent contractor to rectify dangerous conditions that arise during loading and unloading. *Munoz* v. *Flota Mercanta Grancolombiana, S.A., supra,* 553 F.2d at 840; *Ruffino* v. *Scindia Steam Navigation Co.,* 559 F.2d 861 (2 Cir. 1977); *Hickman* v. *Jugoslavenske Linijska Plovidba Rijeka, "ZVIR",* 570 F.2d 449 (2 Cir. 1978). The last of this line of cases is *Cox* v. *Flota Mercante Grancolombiana,* Docket No. 77-7338, decided May 10, 1978, slip opinions 2989. There a unanimous panel directed dismissal of a complaint on facts which the majority properly concedes, see fn. 3, are indistinguishable from those in the instant case.[7] While the majority disregards *Cox* because the opinion was handed down in the face of known disagreement by a majority of this panel, our district judges can scarcely be expected to function with so discordant a chorus on this court.

The first basis on which the district judge and the majority would hold the vessel liable—knowledge of the accumulation of grease—is plainly untenable. When Farrell Lines engaged Universal to load and Holleran to lash the cargo, it was entitled to assume that they would perform the job in a workmanlike fashion, including compliance with the Safety and Health Regulations for Longshoring, 29 C.F.R. 1918.91(c), which require that "slippery conditions shall be eliminated as they occur," and place responsibility for compliance on stevedores. See 29 C.F.R. §§ 1918.2(a); 1918.3(c); *Brown* v. *Mitsubishi Shintaku Ginko,* 550 F.2d 331, 333 (5 Cir. 1977). If grease had accumulated on the site of the accident for several hours, the responsibility for removing it or warning workers about it rested primarily on the independent contractors whose employees were regularly on the scene and were or should have been supervised, not on the ship. The ship would therefore certainly not have been negligent if it merely failed to discover the existence of the grease within the hours this assertedly was accumulating. Moreover, even if some unidentified ship personnel might have (or, as the district judge said even less convincingly, "should have") seen the grease when they were "pulling out" cluster lights to help the longshoremen and carpenters—assuming there was sufficient evidence for the judge to conclude that this had occurred, which I seriously doubt—this does not establish negligence on the part of the ship. First, any knowledge of the unknown deckhands about the grease would be imputable to Farrell Lines only if they had a duty to inform Farrell about it, ALI, Restatement of Agency 2d § 272, which they may not have had, see *id.* at § 275 illust. 6, unless, for example, they were ship's officers, for which there was no proof at all. Moreover, even if the ship could be said to have had constructive notice of the condition, there was no reason to think that the independent contractors who were primarily responsible for eliminating or warning about it would not take care of the problem as they were bound to do. This is particularly so since, as the district judge noted, Trovato, a Holleran employee and witness for Canizzo, said he saw the grease at 1:30 P.M. and hence could have reported the condition to his employer for corrective action.

There is likewise no merit in the alternative theory that the ship's deckhands aggravated the danger by placing the cluster lights on top of the grease and this aggravation was a substantial factor in causing Canizzo's injury,

7 Indeed the facts in *Cox* were stronger for the employee. There was evidence that placing pins in the beams was the ship's responsibility and that a mate had agreed with the hatch boss to supply them.

ALI, Restatement of Torts 2d §§ 430, 431. In the first place, there was no sufficient evidence to support this. Even if the testimony were deemed adequate to sustain the conclusion that the lights were brought out by deckhands rather than the longshoremen, there is no evidence that deckhands were responsible for placing them where Canizzo fell. Also, if the deckhands had placed the lights precisely at that spot, there were wires on the deck before the cluster lights were put out and Canizzo made no claim that he would not have fallen except for the lights. In his contemporaneous accident report he made no mention of the cluster lights, saying only that he "tripped over debris (old gear and wire)," and at trial his account of the accident was simply that he noticed grease on his overalls and shoes after his fall and that on the deck "there was a few wires there, with grease on them, and cluster lights with the wire hanging, you know, all messed up." The basic cause of Canizzo's slipping was, of course, the grease; its removal was the primary responsibility of the independent contractors, not of the ship. Beyond this, if the cluster lights in fact aggravated the danger caused by the grease and the wires, Canizzo's employer had the responsibility and the opportunity to place them elsewhere and the ship was entitled to assume that it would.

The judgment should be reversed with instructions to dismiss the complaint.

Supreme Court, U. S.
FILED
AUG 8 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-72

WALTER COX,

Petitioner,

—against—

FLOTA MERCANTE GRANCOLOMBIANA, S.A.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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August 7, 1978

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

Opinion Below

The opinion of the Court of Appeals for the Second Circuit is not yet officially reported and is made part of the Appendix to the Petition.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Questions Presented

1. Does a vessel owner under the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act (LSHWCA) owe a continuing non-delegable duty to correct all discoverable potentially unsafe conditions created by an expert independent stevedoring contractor during the course of the contractor's work?

2. When an expert stevedoring contractor (a) takes control of a vessel's cargo hatch and elects a plan and method of discharging operation that converts a safe place of work into one potentially unsafe, (b) works in violation of applicable Department of Labor Safety and Health Regulations that prohibit the stevedoring contractor from performing its work while such a potentially unsafe condition exists, and (c) by its affirmative act of negligence causes the unsafe condition to injure its employee, is a vessel owner negligent for failing to discover and remedy the potentially unsafe condition created by the stevedoring contractor?

Statement of the Case

On March 31, 1975, the CIUDAD DE CUENCA, a vessel owned by respondent Flota Mercante Grancolombiana S.A. (hereinafter "Flota" or "shipowner") was docked at Pier 3, Port Authority, Brooklyn, for cargo discharging and loading operations.

Flota had contracted with Universal Maritime Services (hereinafter "UMS"), an expert stevedoring independent

contractor, for the latter to move the cargo from the vessel to the pier.

Approximately thirty minutes prior to UMS coming aboard the CUENCA and taking control of the hatches (including No. 2 where the injury occurred) UMS supervisors met to formulate the order, methods and manner by which the New York-bound cargo was to be discharged.

The participants at that meeting consisted solely of the three ranking supervisory personnel of UMS. With regard to No. 2 hatch, (1) UMS decided that two gangs of their employees would commence discharging cargo from the 'tween deck, (2) when its forward end was discharged, UMS would remove its hatch boards and beams, (3) UMS' foreman, Vincent Maresca, was specifically instructed to make certain that the forwardmost beam in the after end of the 'tween deck was secured in accordance with applicable safety regulations and UMS standard practice, and (4) UMS then would begin discharging the lower hold simultaneously as it continued discharging the 'tween deck (a procedure referred to as working a split hatch).

At 8 A.M. the UMS took control of the No. 2 hatch with two gangs discharging coffee from the 'tween deck until 10:30 A.M.

There was no necessity to have the 'tween hatch beams secured either while the vessel was at sea nor during the time that both gangs of longshoremen were working on top of these boards and beams.

At 10:30 A.M. the longshoremen removed the hatch boards and beams from the forward end of the No. 2 hatch to enable them to discharge cargo from the lower hold.

UMS did not comply with the Department of Labor's Safety and Health Regulations, UMS standard practice, or the specific instructions of the UMS superintendent, re-

quiring it to make sure the forewardmost hatch beam was adequately secured prior to discharging cargo from beneath the beam.

Hence, at approximately 11 A.M. a potentially unsafe place to work was created by the stevedore. Despite the fact that the stevedore did have the necessary equipment to lash the beam, and does lash beams, the UMS-chosen plan of discharge by working a split hatch commenced without the forewardmost beam secured.

At 3 P.M. an affirmative negligent act of cargo handling by UMS caused the 'tween deck hatch beam and boards to fall into the lower hold.

There was testimony on behalf of plaintiff that an unidentifiable ship's officer had been requested to furnish pins for the beam. However, under the trial judge's view of the law and pursuant to his charge, this factual issue was not one for the jury's determination. The trial judge charged as follows:

> "If you find that because of the untied beams the plaintiff did not have a reasonably safe place in which to work and that the ship's officers knew or in the exercise of reasonable care should have known of the unsafe condition, yet failed to take reasonable steps to correct it, then you should find the defendant liable.
>
> Additionally, if you find that the plaintiff did not have a reasonably safe place in which to work, even if you find that the plaintiff or his employer knew of the danger facing him because of the untied beams, or that the danger was obvious to him, you must still find for the plaintiff if you find that the defendant should have anticipated that an accident might occur with the beams not tied down, despite such knowledge on the part of the plaintiff and despite the obviousness of the danger to him."

The jury brought in a verdict for the plaintiff. Upon appeal the Circuit Court held that the motion for a directed verdict in defendant's favor should have been granted, and reversed the decision with the instruction that the Complaint be dismissed. (The Circuit Court also held that the charge as given was erroneous.)

ARGUMENT

The Court of Appeals in its decision in the present case correctly applied, in complete accord with Congressional intent and purpose, a uniformly recognized rule of land-based independent contractor negligence law.

One who employs an independent contractor is not liable to an employee of that contractor for an injury sustained as a result of an unsafe condition created and activated by the manner and method of the contractor's performance of its work.

It is respectfully submitted that the Petitioner fails to aid the Court's consideration of the Petition in setting forth "Questions Presented for Review" which contains inaccurate statements and assumptions of both law and fact. For example, questions 1 through 5 as well as 7 and 8 all ask whether a negligent shipowner is relieved from liability. The Petitioner thereby assumes the answer to the very question which was to be determined, "Was the shipowner negligent?"

Of course, an injured longshoreman is not denied the right to sue a shipowner for its negligence under 33 U.S.C. 905(b) because his compensation benefits have been (greatly) increased. (Petitioner's Question 10). But, Congress certainly intended a narrow standard of care in such an action by the 1972 Amendments in exchange for both

the increased injured persons' benefits (at the present time they are increased a maximum of 500 percent) and the abrogation of the shipowners' common law right to seek indemnity from the stevedore.

A statute such as Sec. 905(b), which overturns decades of law and directs the formulation of a new uniform standard based upon land-based law, by necessity, requires time to develop on a case-by-case basis as intended and envisioned by Congress.

While the courts may be making reference to various stated vehicles in arrving at their decisions (e.g., Sections 343, 343A, 409 of the Restatement of Torts 2d), it is the results within the factual circumstances of each case that must be examined for consistency or conflict (Petitioner's Question 9).

The Circuit Courts of Appeal are properly and efficiently sifting through the vast body of land-based law and carefully determining which of those principles are applicable to the maritime care standards as intended by Congress. The results of these decisions to date have been consistent and, therefore, it is submitted a review by this Court is not necessary.

I

There is No Conflict of Decisions

A. Among the Circuits

This Court has often stressed that a petition for certiorari on the grounds of a conflict of circuits must be based upon real conflict. In *Wisconsin Electric Co.* v. *Dumore Co.*, 282 U.S. 813, this Court held:

> "It appearing that the asserted conflict in decisions arises from differences in states of fact, and not in the application of a principle of law, the writ of certiorari is dismissed as improvidently granted."

With all due respect, it is submitted that a reading of the cases from the Fourth and Fifth Circuits cited and quoted by Petitioner demonstrate support for, not conflict with, *Cox.*

In *Gay & Guerra* v. *Bulk Transportation Co.*, 546 F.2d 1233 (5th Cir. 1977) the Circuit Court affirmed the District Court's dismissal of the two cases before it.

The latter, *Guerra*, is strikingly similar to *Cox.* The 5th Circuit Court held, at page 1242:

> "Even though the crew of the vessel was aware of the dangerous condition presented by the stack of pallets, it was the stevedore who created the condition in the first place and it was the stevedore that failed to tie the pallets down and then carelessly knocked one into the hold."

In *Brown* v. *Mitsubishi Shintaku Ginko,* 550 F.2d 331 (5th Cir. 1977) a dangerous condition was created and brought into play by the stevedore. The Fifth Circuit affirmed a grant of summary judgment in favor of the defendant.

In the Fourth Circuit the Court in *Riddle* v. *Exxon Transportation Co.*, 563 F.2d 1103 (1977), citing the above quoted language of *Guerra* with approval, stated at page 1114,

> "Nor do the decisions construing Sec. 905(b) to immunize the vessel from liability for conditions created by the negligence of the shipyard or stevedore differ from the negligence rule long recognized in this Circuit in admiralty cases."

Bess v. *Agromar Line,* 518 F.2d 738 (4th Cir. 1975) was held by the Court in *Riddle, supra,* to be consistent with its decision. In *Bess,* the Court affirmed a directed verdict by the trial judge in favor of the defendant where the unsafe condition in that case had been created by the work of the independent stevedoring contractor.

The Third Circuit in *Hurst* v. *Triad Shipping Co.,* 554 F.2d 1237 (1977) and the Ninth Circuit in *Wescott* v. *Empresas Armadoras, S.A.,* 564 F.2d 875 (1977), both held the vessel not liable where the unsafe place to work was created by the manner and method of the expert independent stevedoring contractor.

Neither *Samuels* v. *Empresa Lineas Maritimas Argentinas,* 573 F.2d 884 (5th Cir. 1978) nor *Wiles* v. *Delta Steamship Lines, Inc.,* 574 F.2d 1338 (5th Cir. 1978), cited without comment by Petitioner, detract from the above rule of law. These two cases do not involve any unsafe condition created by the stevedore, and both decisions hold that the vessels arrived in port with unsafe conditions. Neither case is a final adjudication since rehearing is being sought in *Samuels,* and *Wiles* was remanded to the District Court.

It is clear that *Cox* is absolutely in accord with the results reached in decisions under similar facts in each Circuit which has spoken to date.

B. Intra-Circuit

Petitioner's assertion of a conflict in the Second Circuit's decisions interpreting Sec. 905(b) and the inability of the District Court judges to function with unanimity is belied by the recent decision of Judge Bonsal in *Talliercio* v. *A/S D/S Svendborg & D/S of 1912 A/S* (appended

hereto).[1] Judge Bonsal was quite able to resolve the alleged conflicts among *Cox, Canizzo* v. *Farrell Lines Inc.* (appended to Petition) and *Lubrano* v. *Royal Netherlands Steamship Co.,* 572 F.2d 364 (2d Cir. 1978).

In *Napoli* v. *Hellenic Lines, Ltd.,* 536 F.2d 861 (2d Cir. 1976), *Landon* v. *Leif Hoegh & Co.,* 521 F.2d 756 (2d Cir. 1975), and in the most recent case, *Lopez* v. *A/S D/S Svenborg & D/S of 1942 A/S* (appended hereto), unsafe conditions were said in the decisions to have been present prior to the stevedore's boarding the vessel. *Cox* is not such a factual situation and, hence, does not call for application of similar legal principles.

Lopez, supra, and *Lubrano, supra,* were held to be cases where the vessel owner directed or joined in the direction of the manner and method of stevedoring operations. There is no such contention in *Cox.*

Canizzo, supra, was based on a finding of active negligence of the vessel owner in partially covering an unsafe, slippery deck area. There is no such argument in this case.

In *Munoz* v. *Flota Mercante Grancolombiana, S.A.,* 553 F.2d 837 (2d Cir. 1977) and *Hickman* v. *Jugoslavenska Linijska Plovidba Rijeka, "Zvir",* 570 F.2d 449 (2d Cir. 1978) there was no liability of a vessel for unsafe conditions created by the stevedore. Consistently, *Cox* was based on this same principle.

Stated disagreement with *Cox* by two members of a different panel does not a conflict make. The two cases

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[1] While an Intra-Circuit conflict may not be categorically ruled out as a basis for certiorari, if, for example, a case is in conflict with other Circuit decisions, such intra-Circuit conflict would not be a proper basis in *Cox* which conforms to the results reached in the other Circuit Courts of Appeal.

are factually distinguishable and they, along with the other Second Circuit results, are to date compatible.

At this early stage of the Court's formulation of a standard of care, it is the consistency of the results of the various cases and not a method of arriving at those results (whether Restatement Sections 343; 343A; 409 *et seq.*, "common law negligence"), that governs the issue of conflict in decisions.[2] The use of different Restatement Sections as guidance does not constitute a conflict as long as the final results are consistent. It should be noted also that *Lubrano, Lopez, Landon* and *Napoli* were all remanded to the District Court for further findings.

Thus, we submit there is no basis for certiorari based on the state of law within the Second Circuit.

II

Cox is in Accord With Congressional Intent

In radically amending the Longshoremen's and Harbor Workers' Compensation Act, Congress sought to achieve a balanced and equitable legal relationship among the thousands of persons employed in the steamship and stevedoring industry, steamship owners and stevedores. It is submitted that the clearly stated respective responsibilities required a dismissal of this lawsuit.

The dual purpose of the Amendments was (1) to increase the direct compensation benefits to injured longshoremen and (2) decrease the number of injuries by placing the responsibility for safety and payment on the

[2] E.g., the use of Restatement Sec. 413 in *Lopez, supra,* is of no moment to the present case, having not been raised at any point nor germane to the factual context of *Cox*.

party who is in the best position to prevent such injuries, that being the stevedore in most instances. *Munoz, supra,* at page 839.

To this end, compensation benefits were increased from $70 per week to a current maximum rate in excess of $350 per week; the standard of care of shipowner's liability was drastically limited; and, the shipowner was barred from seeking indemnity from the stevedore.

As stated by the House Committee, "The Committee heard testimony that the number of third-party actions brought under the *Sieracki* and *Ryan* line of decisions has increased substantially in recent years and that much of the financial resources which could be utilized to pay improved compensation benefits were now being spent to defray litigation costs." H.R. Rep. No. 92-1441, 92d Cong., 2d Sess.-5 (1972).

The Senate Report likewise stated, "The social costs of these lawsuits, the delays, crowding of court calendars and the need to pay for lawyers' services have seldom resulted in a real increase in actual benefits for injured workers." S. Rep. No. 92-1125, 92d Cong., 2d Sess.-4.

As to safety, the Senate Report said, "It is important to note that adequate workmen's compensation benefits are not only essential to meeting the needs of the injured employee and his family, but, by assuring that the *employer* bears the cost of unsafe conditions, serve to strengthen the *employer's* incentive to provide a safe place to work." S. Rep. No. 92-1125, 92d Cong., 2d Sess.-2 (1972). (Emphasis supplied).

Congress specifically recognized and approved this limitation of duty owed an employee of an independent contractor. The Congressional intent was quoted and followed in *Teofilovich* v. *D'Amico Mediterranean/Pacific Line,* 415 F.S. 732, 736 (C. D. Calif. 1976).

> *"A vessel owner shall not be liable in damages . . . for the manner or method in which stevedores or employees of stevedores subject to this act perform their work. . . ."* (Emphasis added)

The Circuit Court was completely in accord with the Congressional intent by its dismissal. As stated in *Munoz, supra* at page 841,

> ". . . we would be remiss in our duty to other harbor workers if we required the owner to pay for the stevedore's negligence. All incentives for the stevedore to monitor unsafe procedures then would be lost for under the Act the stevedore is immune from indemnity actions."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a writ of certiorari should be denied.

Respectfully submitted,

THOMAS E. STILES
Counsel for Respondent

GIALLORENZI & CAMPBELL, ESQS.
Of Counsel

APPENDICES

Opinion of the United States District Court for the Southern District of New York Re: *Michele Talliercio* v. *A/S D/S Svendborg, et al.*

(Filed—June 15, 1978)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

MICHELE TALLIERCIO,

Plaintiff,

—against—

A/S D/S SVENDBORG & D/S OF 1912 A/S

Defendant.

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75 Civ. 4192

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By DAVID P. H. WATSON, ESQ., Of Counsel

BONSAL, D. J.

This action was instituted by plaintiff, an Italian national, under the Longshoremen's and Harbor Workers

Compensation Act, 33 U.S.C. §§ 901 *et seq.*, against the owners of m/s Chatine Maersk, seeking damages for injuries sustained while working as a longshoreman for the Universal & Stevedoring Corp. on October 21, 1973. The case was tried non-jury on liability only.

On October 21, 1973, plaintiff Michele Talliercio was on board defendant's vessel m/s Chatine Maersk. He and his gang were engaged in loading operations in the deep tank of the No. 2 hatch. Shortly after 11:00 a.m. after the gang had unhooked a draft from the inshore side of the tank, the winch operator, Eugene Grey, pulled up the bridles. One of the empty hooks caught the lower edge of the offshore deep tank cover, lifting it up out of its track. Before Grey could stop the winch, the hook pulled the cover across the hatch and a steel protecting plate broke off and struck the plaintiff. Grey testified that the winch had "tak[en] off." The plaintiff was rendered unconscious and was taken to a hospital.

Plaintiff contends that defendant shipowner was negligent in failing to provide a "key" to secure the hatch cover to the stanchion on which it rested while the cover was open. As the ship's crew was responsible for opening the covers, plaintiff claims that the defendant shipowner's negligence proximately caused the accident. The hatch boss, Mr. Saverino, testified that he had asked a crew member to secure the cover to the stanchion with a pin, but that the crew member had told him that "it was good." Saverino commenced the loading as soon as his foreman ordered him to.

The defendant contends that the covers were adequately secured by the steel lifting wires and that no pin was

necessary. The Chief Officer of the vessel, Captain Neilsen, testified by deposition that the key would have been used only if the lifting wires had been removed. Moreover, he testified that even if the cover had been secured to the stanchion, the stanchion would simply have been lifted out of its socket as it was only intended to withstand horizontal pressure and not an upward movement. The final accident report by Mr. Kurtz of the Port and Transportation Claims Services, Inc. points out that but for the supporting wires, the entire hatch cover would have fallen into the tank. Finally, the defendant elicited testimony from his expert witness, Captain Wheeler, that the responsibility for the accident lay in the fact that the stevedore used open hooks instead of lip hooks. Unlike an open hook, a lip hook has a small "lip" suspended below the eye of the hook which permits it to be lifted out of the hatch without snagging.

Discussion

Under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq.*, a shipowner is only liable for those injuries proximately caused by his own negligence. *See, e.g., Munoz* v. *Flota Merchante Grancolombiana, S.A.*, 553 F.2d 837, 840 (2d Cir. 1977). Plaintiff argues that the failure of the crew to secure the deep tank covers to the stanchion after the hatch boss, Mr. Saverino, brought it to the attention of a crew member constituted negligence.

In *Cox* v. *Flota Mercante Grancolombiana, S.A.*, Dkt. No. 77-7338 (2d Cir. May 10, 1978), the plaintiff long-

shoreman was working in the hold of the ship when he was struck by a falling hatch cover. The crew had been responsible for opening the hatch covers, and although they were requested by the stevedore to secure the beams with pins, they had failed to do so. Nonetheless, the Second Circuit held that the complaint must be dismissed:

> "It makes no difference here whether the alleged defect was latent or open and obvious. In either case, the situation was known to the stevedore. The stevedore from its inception had complete charge of the unloading operation. Only it could give orders to its employees. . . . If the beam was dislodged by cargo being hoisted out of the hold (as has been suggested as the only possibility), then the cause of the accident was an operation entirely in the hands of the stevedore. It was the stevedore which had exclusive control of the gangs and how, when and where they worked." *Id.* at 2996-2997.

Here, too, the stevedore had exclusive control of his gangs and when and where they worked.

The Court is aware that the result in *Cox* has created some uncertainty as to the applicable law. Recently, in *Canizzo* v. *Farrell Lines, Inc.*, Dkt. Nos. 77-7292, 77-7332 (2d Cir. June 2, 1978), another panel of the Court of Appeals expressed disagreement with Cox. *Id.* at 3207-08 n.3. In *Canizzo*, while the plaintiff longshoreman was travelling from one part of the ship to another to continue his work, he "slipped on a patch of grease which was partially covered by a pile of wires" which was placed there by the ship's crew. *Id.* at 3201. The Court stressed that because

of the uncertainty in construing the 1972 Amendments, a determination of liability must be undertaken on a case-by-case basis, and held that "[t]he existence of a substantial area of grease in a narrow passageway, which should have been known to the ship's personnel, made more dangerous by the positioning by the ship's personnel of the cluster lights and wires upon the greasy area supports the finding of negligence on the part of the ship. . . ." *Id.* at 3206. Thus, the Court emphasized the *affirmative* act of the ship's crew in making the greasy area more dangerous by placing wires on top of it. In the instant case, there was no affirmative act; at most, some crew members may have had knowledge of a possible hazard but the hazard was not apparent in view of the support which the lifting wires provided for the cover.[1] In his dissent in *Canizzo*, Judge Friendly, cautioned that "[u]nless the courts keep the longshoreman's negligence action against the ship within proper bounds, the ship's situation will be worse in some respects than before since it will be deprived of its former third party action against the longshoreman's employer." *Id.* at 3209-3210.

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[1] By emphasizing the affirmative act of the ship's crew, *Canizzo* is more in line with *Lubrano* v. *Royal Netherlands Steamship Co.*, 572 F.2d 364 (2d Cir. 1978), where the plaintiff longshoreman slipped by reason of the absence of dunnage which was supposed to be supplied by defendant shipowner. The Court held that the shipowner might be liable if "the ship's officer approved and joined in the direction that the men keep working, although the dunnage was not there," *id.* at 367—an affirmative act on the part of defendant shipowner. In the instant case, there was no evidence that the ship directed the stevedore to keep his men working.

Moreover, in *Lubrano* v. *Royal Netherlands Steamship Co.*, 572 F.2d 364 (2d Cir. 1978), Judge Moore observed in his dissent that

> "cases have found the shipowner not liable for obviously dangerous conditions, whether existing before control is relinguished to the stevedore or arising later with the knowledge of the shipowner, if the danger is such that the stevedore would be expected to correct the condition in discharging its responsibility to the longshoremen and the condition is one where the shipowner could defer to the competence of the stevedore." [Citations omitted.] *Id.* at 375; *see Riddle* v. *Exxon Transportation Co.*, 563 F.2d 1103, 1111-1112 (4th Cir. 1977).

In *Canizzo,* the greasy patch on the ship's deck which was covered by the pile of wires was not a hazard so connected with the stevedore's expertise in loading operations that "the shipowner [should] defer to the competence of the stevedore." On the other hand, in the instant case, whether the cover should have been secured to the stanchion as well as held by the lifting wires was a condition which "the shipowner could defer to the competence of the stevedore" and which "the stevedore would be expected to correct." Likewise, in *Cox,* the danger of leaving the beams unsecured was one which the stevedore could best recognize such that "[it] would be expected to correct the condition in discharging its responsibility to the longshoremen" and "the shipowner could defer to [its] competence."

In any event, assuming defendant shipowner was negligent in not securing the cover to the stanchion, its negligence was not the proximate cause of the accident. Plain-

tiff has not shown that the securing of the cover with a pin would have prevented the accident. Even if the cover had been secured to the stanchion by a pin, the accident could have happened. Captain Neilson, the Chief Officer of the vessel, testified that securing the cover to the stanchion would not have made any difference. Defendant's expert, Captain Wheeler, testified that the use of ordinary hooks on the bridles caused the accident, which could have been prevented if the longshoremen had used lip hooks.

Accordingly, judgment may be entered for the defendant with costs.[2]

Settle judgment on notice.

Dated: New York, N.Y.
June 15, 1978

DUDLEY B. BONSAL
U.S.D.J.

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[2] Plaintiff also claims that the winch was defective. While Grey, the winch operator, testified that the winch had "tak[en] off," he made a statement at the time of the accident that there was nothing the matter with the winch (plaintiff's Exhibit 4). There was no evidence that if the winch was defective that the shipowner knew about it, although there was evidence that the stevedore did.

Moreover, the accident could have been prevented if the stevedore in the hold had steadied the hook before the winch operator lifted it out of the hold. By ignoring the hook's swinging motion, the hold men and the winch operator allowed the hook to catch the lower edge of the deep tank cover, causing the accident.

Opinion of the United States Court of Appeals for the Second Circuit Re: *Esteban Lopez v. A/S D/S Svendborg, et al.*

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 899—September Term, 1977.

(Argued May 25, 1978 Decided July 24, 1978.)

Docket No. 78-7046

ESTEBAN LOPEZ,

Plaintiff-Appellant,

—v—

A/S D/S SVENDBORG and D/S of 1912 A/S,

Defendants-Appellees.

Before:

OAKES, *Circuit Judge,* and
MEHRTENS* and BLUMENFELD,** *District Judges.*

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* Senior United States District Judge for the Southern District of Florida, sitting by designation.

** Senior United States District Judge for the District of Connecticut, sitting by designation.

Opinion of the United States Court of Appeals for the Second Circuit Re: Esteban Lopez v. A/S D/S Svendborg, et al.

Appeal from directed verdict by United States District Court for the Southern District of New York, Richard Owen, *J.*, in negligence action by longshoreman suing shipowner for personal injuries.

Reversed and remanded.

MORRIS CIZNER, New York, N.Y. (Zimmerman & Zimmerman, New York, N.Y., of counsel), *for Plaintiff-Appellant.*

JAMES M. HAZEN, New York, N.Y. (William P. Kain, Jr., Haight, Gardner, Poor & Havens, New York, N.Y.), *for Defendants-Appellees.*

BLUMENFELD, *District Judge:*

This is another case which calls for the application of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§ 901-950. The plaintiff is a longshoreman who was accidentally injured while at work discharging cargo in the bottom of a hold on the M/S TREIN MAERSK, a vessel owned by the defendants A/S D/S Svendborg and D/S of 1912 A/S. He brought an action in negligence against the shipowner which was tried for two days before Judge Richard Owen and a jury. After the plaintiff rested, the trial judge granted the defendants' "motion to dismiss" for failure to prove a prima facie case of liability against the defendants. The jury was discharged without reaching a verdict. No findings were made as called for by Rule 41(b), Fed. R. Civ. P. The parties have treated this procedural posture of the case as if the court had granted a defendant's motion for a directed verdict under Rule 50(a). Since this was a trial to a jury, we are of the

view that it is appropriate to consider the case on that basis.

At issue on this appeal is whether there was evidence of negligence by the defendant shipowner "of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions. . . ." *Boeing Co.* v. *Shipman*, 411 F.2d 365, 374 (5th Cir. 1969). *See also Epoch Producing Corp.* v. *Killiam Shows, Inc.*, 522 F.2d 737, 742-43 (2d Cir. 1975), *cert. denied*, 424 U.S. 955 (1976). In making that assessment we "must view the evidence and all inferences most favorably to the party against whom the motion is made," *O'Connor* v. *Pennsylvania R.R. Co.*, 308 F.2d 911, 914 (2d Cir. 1962). "The non-moving party is given the benefit of all reasonable inferences from the evidence, and evidence unfavorable to it may be considered only if that evidence stands uncontradicted and unimpeached." *Bigelow* v. *Agway, Inc.*, 506 F.2d 551, 554 (2d Cir. 1974).

I.

There was evidence from which the jury could have found the following facts: the plaintiff, a longshoreman employed by Universal Terminal and Stevedoring Co. as a hold-man, was discharging cargo from the square of the lower hold of Hatch No. 4 of the defendants' vessel on February 28, 1973, when he sustained an accidental injury to his back.

Lopez and the longshore gang of which he was a member had boarded the ship at 8:00 a.m. and were directed

to begin at No. 4 hold, from which the hatch cover had already been removed. Loose cartons on top of the stow, held in place by the coaming, were quickly removed. The cargo below those cartons had been palletized. Even though the cargo may have been properly stowed before making a long voyage to New York from the Orient, it had shifted, apparently because of heavy seas. Not only had it shifted, but the cargo was in a considerably damaged condition. Packages had been damaged and kegs of bolts had broken open. Loose bolts were heavily scattered throughout the remainder of the cargo. Some bolts had sifted down as far as the floor of the hold through spaces created when the cargo shifted. The loose bolts scattered about made the hold a dangerous place for the longshoremen engaged in removing the cargo.

The condition of the stow in hold No. 4 was called to the attention of an officer of the ship and the stevedore's foreman by the hatch boss. Both looked down into the hold and observed it. The hatch boss asked, "What are you going to do with this mess?" In the presence of the ship's officer, he was told, "Keep working, the cargo got to come out of the ship, tell your men to be careful; keep working." Later that morning, after most of the cargo in the square of hold No. 4 had been removed, the plaintiff and a coworker were lifting a case from the floor of the square to a pallet from which it had fallen, when the plaintiff stepped on a loose bolt which caused him to slip and subject the muscles of his back to a sudden and unexpected strain, resulting in the injuries for which he sued.

II.

The reasons Judge Owen gave for his decision to grant the defendants' motion to dismiss the complaint may be extracted from the statements he made during colloquy with counsel. More than one reason was given.

(1) First he considered the conduct of the plaintiff. He focused his attention upon the duty of the plaintiff with respect to the risk of injury.

> "It seems to me absolutely clear on this record, without argument, that there is no jury question here. Longshoremen, since time immemorial have had to work under circumstances where there is litter, there is debris, there are turnbuckles, there are bales of wire, there are pieces of dunnage broken and unbroken, lying about areas in which they are working. And they are expected to cope with this kind of thing lying around the areas in which they are working" Tr. 226.

(2) Second, he considered the conduct of the defendants. Proof of the risk of injury to the plaintiff and of how it had been created did not pose any problem. That was evident from his application of what he conceived to be the law to the facts. Quoting from *Ruffino* v. *Scindia Steam Navigation Co.*, 559 F.2d 861, 862 (2d Cir. 1977), he said,

> "if you go with this case on the Ruffino test, . . . the law there is, 'Before liability can attach for [an] independently created danger,' which is here arguably heavy seas, 'the owner must have knowledge of its existence and [the] opportunity to alleviate it.' There is no question on this record the jury can find the owner knew of its existence." Tr. 227.

He continued:

> "I just don't see how there was an opportunity here on [*sic*] the owner of the vessel to alleviate this condition, even assuming that you find it to be an independently created danger. . . .
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> ". . . It is certainly reasonable for the vessel to assume that under these circumstances, experienced longshoremen would be able to avoid stepping on a bolt and taking a spill." Tr. 227-28.

By this juxtaposition of comments on the duty of the shipowner and the duty upon the plaintiff it appears that the Judge may have been adopting the harsh rule that contributory negligence is a complete bar to recovery. In admiralty contributory negligence may reduce, but does not bar, recovery for personal injuries. Under the admiralty rule the plaintiff's recovery is reduced in proportion to his own fault. *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406, 408-09 (1953). By its adoption of the 1972 Amendments to LHWCA, Congress intended that comparative negligence would apply to longshoremen's actions, and that assumption of risk would not. H.R. Rep. No. 92-1441, 2d Cong., 2d Sess., *reprinted in* [1972] U.S. Code Cong. & Ad. News 4698, 4705.[1] The ruling of the

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[1] ". . . [T]he Committee intends that the admiralty concept of comparative negligence, rather than the common law rule as to contributory negligence, shall apply in cases where the injured employee's own negligence may have contributed to causing the injury. Also, the Committee intends that the admiralty rule which precludes the defense of 'assumption of risk' in an action by an injured employee shall also be applicable."

court was in error insofar and it was based on a conclusion that the plaintiff was barred from recovery because he was guilty of contributory negligence or had assumed the risk of his injuries. Whether, at all, and if so to what extent, any contributory negligence of the plaintiff should reduce his damages must be left to the jury for its determination.

Having considered whether the plaintiff is entitled to be compensated, we turn next to the question of whether, in view of the fact that the shipowner knew of the dangerous conditions in the hold which existed when it was turned over to the stevedore, the shipowner ought to pay. There was evidence from which the jury could conclude that the defendant was negligent.

III.

In defining the parameters of the case before us we heed the opening phrase of Judge Friendly's dissenting opinion in *Canizzo* v. *Farrell Lines, Inc.*, No. 77-7292, slip op. at 3209 (2d Cir. June 2, 1978):

> "Courts must be exceedingly careful in defining the contours of the longshoreman's actions for negligence against the ship, which was preserved by § 905(b) of the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act. . . ."

The purposes of Congress in enacting the 1972 Amendments to LHWCA have been so perceptively enlarged

upon in other cases[2] that additional broad analysis here would be redundant.

Two principles are settled. In eliminating the absolute liability of a shipowner for unseaworthiness, the 1972 Amendments to LHWCA, 33 U.S.C. §§ 901-950, Congress intended that a vessel would be liable only for its own failure to use reasonable care, *Munoz* v. *Flota Mercante Grancolombiana, S.A.*, 553 F.2d 837, 840 (2d Cir. 1977), which would be determined in accordance with land-based principles of negligence, *Napoli* v. *Hellenic Lines, Ltd.*, 536 F.2d 505, 507 (2d Cir. 1976). *See Ruffino* v. *Scindia Steam Navigation Co., supra,* 559 F.2d at 862.

As the trial judge correctly decided, there was evidence that the defendant knew of the risk of injury from the loose bolts to anyone working in hold No. 4. He was, nevertheless, persuaded to rule that no jury could properly find that the defendant was negligent. His recorded remarks disclose that he relied expressly upon a dictum in *Ruffino* v. *Scindia Steam Navigation Co., supra,* 559 F.2d at 862: "Before liability can attach for [an] independently created danger, the owner must have knowledge of its existence and [the] opportunity to alleviate it"[3] A fuller reading of *Ruffino* indicates that the "opportunity

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[2] *E.g., Ruffino* v. *Scindia Steam Navigation Co.*, 559 F.2d 861 (2d Cir. 1977); *Munoz* v. *Flota Mercante Grancolombiana, S.A.*, 553 F.2d 837 (2d Cir. 1977).

[3] Immediately after quoting from *Ruffino* he continued:

> "There is no question on this record the jury can find the owner knew of its existence.

(Footnote continued on following page)

to alleviate" phrase is merely a timeliness gloss on the requirement of notice of the dangerous condition, meaning only that the defendant must have notice of it in sufficient time to take action to remedy it. In other words, "The mere existence of a defect or danger is not enough to establish liability, unless it is shown to be of such a character or of such duration that the jury may reasonably conclude that due care would have discovered it." W. Prosser, *Law of Torts,* § 61 at 393 (4th ed. 1971). The cases cited in *Ruffino* do not purport to give any content to "opportunity to alleviate" other than knowledge of the risk in time enough to take protective measures against the risk of injury.

We follow *Napoli* v. *Hellenic Lines, Ltd., supra,* which held that where there was sufficient evidence of knowledge by the shipowner of "obvious dangers which it should reasonably anticipate that the longshoremen would be unable to avoid," the case should have gone to the jury under § 343A of the Restatement (Second) of Torts. 536 F.2d at 509. In pertinent part, § 343A(1) states:

> "A possessor of land is not liable to his invitees for physical harm caused to them by any activity or

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(Footnote continued from preceding page)

"But where I come up against a wall is the opportunity to alleviate it. I don't see what the shipowner could have been expected to do here in terms of curing this, because until you get down to the bottom of the cargo, you don't know whether you are going to find some bolts lying there, and first you've got to get the cargo out, and then sweep it up.

"I just don't see how there was an opportunity here on [*sic*] the owner of the vessel to alleviate this condition. . . ." Tr. 227.

> condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness." Restatement (Second) of Torts § 343A(1) (1965).

This deviation from the general rule that reasonable care requires nothing more than a warning of the danger is a recognition that there are cases

> "where the occupier, as a reasonable man, should anticipate an unreasonable risk of harm to the invitee notwithstanding his knowledge, warning, or the obvious nature of the condition, something more in the way of precautions may be required. . . . In all such cases the jury may be permitted to find that obviousness, warning or even knowledge is not enough." W. Prosser, *supra,* § 61 at 394-95, *quoted with approval in Anuszewski* v. *Dynamic Mariners Corp. Panama,* 391 F. Supp. 1143, 1147 (D. Md. 1975), *aff'd,* 540 F.2d 757 (4th Cir. 1976), *cert. denied,* 429 U.S. 1098 (1977).

Here, as in *Lubrano* v. *Royal Netherlands Steamship Co.,* No. 77-7211 (2d Cir. Feb. 15, 1978), there was evidence of direct knowledge of the unsafe condition before the injury occurred and that the ship's officer knew that nothing was going to be done to alleviate it. What was said there is squarely applicable, slip op. at 1539: "But if there is again evidence that a ship's officer, after being notified of the open and obvious danger of insufficient dunnage for a slippery cargo, had the men keep working *or joined in the stevedore's decision to do so,* then there would be a jury question." (Emphasis added) In this case the evidence "was enough to allow a jury to conclude

that the ship's officer approved and joined in the direction that the men keep working. . . ." *Id.*, slip op. at 1538. The plaintiff was not instructed as to what he should do about the "mess" but was apparently allowed to use his own judgment. The circumstance that the risk of harm was not recognized until the removal of the cargo was in progress is no basis for failure to take precautionary methods against it after the dangerous condition became known. Indeed, the Restatement (Second) of Torts § 413 requires the employer of an independent contractor to use reasonable care to provide for precautions where the work to be done *should be recognized* "as likely to create, during its progress, a peculiar unreasonable risk of physical harm to others unless special precautions are taken. . . ."[4] Comment d. states:

> "Although the employer at the time he lets the contract has no reason to anticipate that conditions will arise which require special precautions to be taken, if in fact such conditions do arise and he knows or should know of them, he is then required to act

[4] Restatement (Second) of Torts, § 413 reads:

> "One who employs an independent contractor to do work which the employer should recognize as likely to create, during its progress, a peculiar unreasonable risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the absence of such precautions if the employer
>
> (a) fails to provide in the contract that the contractor shall take such precautions, or
>
> (b) fails to exercise reasonable care to provide in some other manner for the taking of such precautions."

> in the manner required by the rule stated in this Section."

The fact that differences frequently arise as to whose duty it is to take precautionary measures in cargo removal operations indicates the applicability of § 413, for as Comment b. explains:

> "This Section is concerned with special risks, peculiar to the work to be done, and arising out of its character, or out of the place where it is to be done, against which a reasonable man would recognize the necessity of taking special precautions. The situation is one in which a risk is created which is not a normal, routine matter of customary human activity, such as driving an automobile, but is rather a special danger to those in the vicinity, arising out of the particular situation created, and calling for special precautions."

Under the foregoing principles the jury could have found that the defendant was negligent toward the plaintiff.

IV.

The fact that the stevedore shared in the decision to continue working did not exonerate the shipowner, and there is no reason, as a matter of fundamental tort law, why it should not be held liable in damages for its own negligence. It is well established tort law that "an actor whose negligence has set a dangerous force in motion is not saved from liability for harm it has caused to innocent persons solely because another has negligently failed to take action that would have avoided this." *Petition of*

Kinsman Transit Co., 338 F.2d 708, 719 (2d Cir. 1964), *cert. denied sub nom. Continental Grain Co.* v. *City of Buffalo*, 380 U.S. 944 (1965). Thus, even if the stevedore was negligent in failing to eliminate the dangerous condition, that would not be a defense for the shipowner. Moreover, in *Dodge* v. *Mitsui Shintaku Ginko K.K. Tokyo*, 528 F.2d 669, 674 (9th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976) it was expressly held "that a longshoreman who has been injured by the concurring negligence of his employer stevedore and the vessel owner can recover the total of his damages from the vessel owner." We have also rejected a contention by a shipowner that an injured longshoreman could not recover damages against it unless he proved that the shipowner was solely responsible for his injury, stating:

> "First, the draftsmen of section 5(b), 33 U.S.C. § 905(b), could easily have inserted the word 'sole' so that the clause would have read 'caused by the "sole" negligence of the vessel.' Nothing has been called to our attention to indicate such intention. Second, Congress would hardly have given the ship so little incentive to avoid being negligent toward its longshoremen invitees. Third, the scheme of the Act is to provide workmen's compensation for a longshoreman from his own employer, but with a right to sue the ship for negligence. We cannot agree that some negligence by the employer is enough to cut off the injured' longshoreman's protected right to sue the ship for its own negligence. Of course, if the negligence was *solely* that of the stevedore, the ship would have been found neither negligent nor liable." *Landon* v. *Lief Hoegh & Co.*, 521 F.2d 756, 763 (2d Cir. 1975) (footnote omitted), *cert. denied sub nom. A/S Arcadia* v. *Gulf Insurance Co.*, 423 U.S. 1053 (1976).

After our decision in *Landon*, the court in *Dodge, supra*, 528 F.2d at 672, in taking the view we expressed, quoted with approval from *Santino* v. *Liberian Distance Transports, Inc.*, 405 F. Supp. 34, 35 (W.D. Wash. 1975):

> "'On its face it seems inequitable for a shipowner to be liable to an injured longshoreman for all of the latter's damages if the negligence of the shipowner was not the sole proximate cause of the injuries but rather concurred with the negligence of the stevedore employer. Particularly would this be true if the fault of the stevedore employer were much greater than that of the shipowner. Nevertheless, since the Longshoremen's and Harbor Workers' Act is a creature of Congress, it would in this Court's opinion be better for Congress to effect the elimination of any inequity than to have the various District Courts seek to remove that inequity by means which would unavoidably vary from district to district.
>
> "'Permitting a shipowner to plead the negligence of the stevedore as an affirmative defense would not eliminate inequity. *It would simply shift the inequity from shipowner to injured longshoreman. He would be restricted in his recovery as against the shipowner without acquiring any offsetting rights under the Act as against his stevedore employer.*' (emphasis added)."

And, more recently, the Fifth Circuit adhered to the rationale of *Dodge* and *Landon* in upholding a judgment for a longshoreman against a vessel owner for negligence in

a terse and vigorous opinion by Judge Rubin, who considered cases from other circuits with contrary holdings. *Samuels* v. *Empresas Lineas Maritimas Argentinas,* No. 76-2129 (5th Cir. May 26, 1978). The rule that the shipowner cannot use the negligence of the stevedore as a defense to a negligence action against it brought by the injured longshoreman, is strengthened by its corollary that the shipowner cannot assert the stevedore's negligence to defeat the stevedore's right to reimbursement of compensation payments out of any damages the longshoreman may recover. In *Pope & Talbot, Inc.* v. *Hawn, supra,* the Court held that even though the stevedore was concurrently negligent, it could still recover its compensation lien in full, noting, 346 U.S. at 412, that "reduction of [the shipowner's] liability at the expense of [the stevedore] would be the substantial equivalent of contribution which we declined to require in the *Halcyon*[5] case." We have recently held that *Pope & Talbot* is still good law. *Landon, supra,* 521 F.2d at 760.

V.

Despite the existence of evidence from which the jury could have found that the condition which constituted the risk of injury to the plaintiff was attributable to the ship alone, the defendant contends that it should not be held liable for his injuries. It argues that it was reasonable, as a matter of law for the shipowner to do nothing to remedy the condition because it could rely upon the stevedore to take necessary precautionary measures. A vigorous dissent in *Lubrano, supra,* contended for that view on the ground that the stevedore was an independent contractor to whom control over the premises had been relinquished. Support for that view is also found in Judge Friendly's dissenting opinion in *Canizzo, supra,* slip op. at 3211, where he says:

> "In dealing with § 905(b), courts would do better to consider the policies that actuated Congress in adopting the 1972 Amendments. In my view Congress did not mean to subject the ship to liability for every dangerous condition known or knowable to it when it had a right to assume that this would be remedied by the employer, as § 941(a) requires."[6]

The recent decision in *Cox* v. *Flota Mercante Grancolombiana,* S.A., No. 77-7338 (2d Cir. May 10, 1978), reversed a jury verdict in favor of Cox, a longshoreman, against the ship on the ground that it was the stevedore's duty alone as an independent contractor to remedy unsafe conditions. The *Cox* decision was handed down "in the face of known disagreement by a majority of [the]

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[5] *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.,* 342 U.S. 282 (1952).

[6] A different view of Congressional awareness of what it was doing was expressed in *Lubrano*: "The ultimate decision reached by Congress was not made lightly. Instead, the result reflects a delicate balancing by Congress of the interests of the various parties involved. The longshoremen received increased benefits, the shipowners are liable only if negligent, and the stevedore did not face the *Ryan* [*Stevedoring Co., Inc.* v. *Pan Atlantic S.S. Corp.,* 350 U.S. 124 (1956)] secondary suit." *Lubrano* v. *Royal Netherlands,* No. 77-7211, slip op. at 1545-46 (2d Cir. Feb. 15, 1978) (Moore, J., dissenting).

panel" in *Canizzo, supra,* which *upheld* a jury verdict for a longshoreman against a ship and included a comment on *Cox's* contrary view.[7]

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[7] Judge Smith commented, slip op. at 3207-08 n.3:

> "*Cox* v. *Flota Mercante Grancolombiana, S.A.* was decided May 10, 1978, slip op. 2989ff, while this case was sub judice. *Cox* seems to us in conflict with at least *Lubrano* v. *Royal Netherlands S.S. Co.*, —— F.2d ——, slip op. 1533 (2d Cir. Feb. 15, 1978), among the decisions in this circuit.
>
> "While each case must be determined on its own facts, the result in *Cox* cannot reasonably be reconciled with our result here by the differences in the factual situations, for the proof of ship's negligence in *Cox* was at least comparable to that here. With all respect, however, we must disagree with the result in *Cox*. It appears to us to do what the Congress was unwilling to do, abolish the shipowner's liability to the injured longshoreman in negligence as well as in unseaworthiness. As Judge Friendly points out, liability of the ship for such negligence as a greasy deck attributable to the ship's company was specifically contemplated and thought to be preserved by the legislation.
>
> "Litigation in this troubled field would be tidier if the Congress had eliminated altogether the ship's possible liability to longshoremen. There are, however, other considerations.
>
> "Benefits under the Longshoremen's and Harbor Workers' Act have been considerably increased. We cannot overlook the fact, however, that as is usual under workmen's compensation schemes, they do not fully compensate for the loss suffered. If the ship, not a party to the employment contract, is absolved from liability for its own negligence, this uncompensated loss, which may be very great, is shifted from the negligent ship to the often innocent employee. The terms of the

(Footnote continued on following page)

This case also will fall within what seems to be rapidly becoming an overly complex and unpredictable body of law. Because of the different views as to whether an employer's failure to remedy a dangerous condition is a defense to a suit by the longshoreman against a ship for its own negligence, we feel that it may not be amiss to explain why we do not agree that the failure of the stevedore to remove or provide protection against the conditions created by the shipowner relieves the latter of liability for injuries to a longshoreman caused by those conditions.

To avoid the risk of being misunderstood, we do not say that a shipowner should be held *vicariously* liable for the tortious acts of an independent contractor, or his servants. But the shield against vicarious liability for the negligence of an independent contractor does not also shield the shipowner from liability for its own negligence. Although § 905(b) may be construed to "demonstrate that . . . the major responsibility for the proper and safe conduct of the work was to be borne by the stevedore," *Brown* v. *Ivarans Rederi A/S*, 545 F.2d 854, 860 (3d Cir. 1976), *cert. denied*, 430 U.S. 969 (1977); *Ramirez* v. *Toko Kaiun K.K.*, 385 F. Supp. 644, 653 (N.D. Cal.

(Footnote continued from preceding page)

> statute and the legislative history indicate to us that while Congress was willing to shift the burden of injury without fault to an improved compensation system for shore workers (who arguably never should have been classified with seamen anyway) it was not willing so to shift the burden of injury through the fault of the ship. This policy judgment we would leave to the Congress."

1974), or that "the primary duty to provide a safe place to work is on the stevedore," *Lucas* v. *"Brinknes" Schiffahrts Ges.*, 379 F. Supp. 759, 768 (E.D. Pa. 1974), neither "major responsibility" nor "primary duty" may be read as "sole responsibility." *See Landon, supra,* 521 F.2d at 762-63.

In rejecting the argument of a shipowner that it should not be held liable unless its negligence was the sole cause of the damages, we noted in *Landon, id.* at 763: "Congress would hardly have given the ship so little incentive to avoid being negligent toward its longshoremen invitees." The basis for an assumption that prevention can be maximized by shifting the liability to one already liable, and only for a lesser amount, is doubtful.[8]

When Congress relieved the shipowner of the no-fault concept of seaworthiness, it preserved the liability for

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[8] For a detailed analysis, and a comprehensive collection of cases and authoritative treatises and articles dealing with this question, *see* Comment, *Risk Administration in the Marketplace: A Reappraisal of the Independent Contractor Rule,* 40 U. Chi. L. Rev. 661 (1973). The article states:

> "Nothing in economic theory or practical experience leads to the conclusion that either employers as a class or independent contractors as a class are in all cases better able to distribute the costs of risk." *Id.* at 672.

Removing the incentive upon the shipowner to prevent injuries does not increase the incentive of the employer who is liable whether negligent or not. While both employ subordinates to work for them, it seems obvious that a shipowner, as an entrepreneur is in a better position to distribute the loss than a stevedore, whose business is to furnish only a relatively small proportion of the total amount of services which the shipowner provides to shippers.

negligence, explaining, H.R. Rep. No. 92-1441, *supra,* at 4073, "This would place vessels in the same position, insofar as third party liability is concerned, as land-based third parties in non-maritime pursuits." And, the House Report also noted, *id.* at 4704, "nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition."

Furthermore, Congress also expressly refused to treat vessels as joint employers of longshoremen:

> "This would result in restricting the vessel's liability in all cases to compensation and other benefits payable under the Act. The Committee believes that where a longshoreman or other worker covered under this Act is injured through the fault of the vessel, the vessel should be liable for damages as a third party, just as land-based third parties in non-maritime pursuits are liable for damages when, through their fault, a worker is injured." *Id.* at 4702.

It could not be clearer that Congress intended shipowners to be liable for their own negligence.

Defendant contends that it cannot be held liable for negligence toward plaintiff because it was entitled to rely on the stevedore's primary duty to alleviate any condition dangerous to its employees. One difficulty with this argument is that the right to rely is based on an agreement between the shipowner and the stevedore. Rules regulating the conduct of persons toward others must be distinguished from agreements governing organization of the work.

The particular ingredient of the independent contractor relationship from which the defendant seeks to forge a shield against liability for its own negligence is said to be the independent contractor's control over the work and the place where the work is done. It is self-evident that if the shipowner relinquishes control of an unsafe place to work to the sole control of the stevedore, that relinquishment comes about because of an agreement it makes with the stevedore.[9] The parties may be careful in drawing their contract to provide an appearance of independence or control of the area where the work is to be done. But to enable a shipowner to escape liability by entering an agreement with the stevedore would contravene Congress' intention.

The 1972 amendments did not modify § 905(a) by which Congress had explicitly made the employers absolutely

[9] In this case neither the scope of the work to be done by the stevedore, nor the extent of its control over the place where it was to be done, were established. There is nothing in the record to establish that the defendant's right as operating owner to control the ship, including the No. 4 hold, at the time the plaintiff was injured was in any way curtailed. *Cf. Hawn* v. *Pope & Talbot, Inc.*, 198 F.2d 800, 803 (3d Cir. 1952), *aff'd*, 346 U.S. 406 (1953). Nor is there anything in the record to establish that the scope of the work contracted for with the stevedore included the duty to pick up the bolts and replace them in the broken kegs and recooper the kegs. Whose duty it was to clean up "the mess" is disputed. Although the plaintiff reported the condition he did not refuse to continue to work at unloading the cargo. In a similar situation a Court of Appeals held that a judge's finding that the plaintiff was 75 percent contributorily negligent had to be modified because the evidence would not support a conclusion that the plaintiff was more than 50 percent at fault. *Mazzanti* v. *Lykes Bros. Steamship Co.*, 524 F.2d 961 (5th Cir. 1975).

liable for compensation "exclusive and in place of all other liability . . . to the employee." *See Louviere* v. *Shell Oil Co.*, 509 F.2d 278 (5th Cir. 1975), *cert. denied sub nom. American Marine Corp.* v. *Louviere*, 423 U.S. 1078 (1976). Section 905(b) provides from the other side that in the case of injury to a covered employee, "the employer shall not be liable to the vessel for such damages directly or indirectly and *any agreements or warranties to the contrary shall be void.*" (Emphasis added)

The intent of Congress in outlawing such agreements is spelled out in H.R. Rep. No. 92-1441, *supra*, at 4704-05:

> "Furthermore, unless such hold-harmless, indemnity or contribution agreements are prohibited as a matter of public policy, vessels by their superior economic strength could circumvent and nullify the provisions of Section 5 of the Act [33 U.S.C. § 905] by requiring indemnification from a covered employer for employee injuries.
>
> "Accordingly, the bill expressly prohibits such recovery, whether based on an implied or express warranty. It is the Committee's intention to *prohibit such recovery under any theory including, without limitation, theories based on contract or tort.*[10]
>
> "Under the proposed amendments the vessel may not *by contractual agreement or otherwise* require the employer to indemnify it, in whole or in part, for such damages." (Emphasis added)

[10] For a thorough and perceptive analysis of the differences between tort-based and contract-based indemnity such as we have become accustomed to expect from Judge Friendly, see *Zapico* v. *Bucyrus-Erie Co.*, No. 77-7533 (2d Cir. June 15, 1978).

In *Zapico* v. *Bucyrus-Erie Co.*, No. 77-7533, slip op. at 3486 (2d Cir. June 15, 1978), Judge Friendly observed that the legislative history "does indicate that § 905 was meant to prevent *Ryan* indemnity actions by vessels. . . ." And he stated, *id.:* "The shipowners got a *quid pro quo* for the loss of their indemnity rights." The *quid pro quo* was the mitigation of the harsh no-fault doctrine of seaworthiness. *See S.S. Seatrain Louisiana* v. *California Stevedore & Ballast Co.*, 424 F. Supp. 180, 182-83 (N.D. Cal. 1976). Indeed, the House Report states, H.R. Rep. No. 92-1441, *supra,* at 4704: "The Committee also believes that the doctrine of the *Ryan* case . . . is no longer appropriate. . . ."

To permit a shipowner to negotiate with the stevedore by "contractual agreement or otherwise" for cargo removal operations so as to relieve it of liability to the longshoreman for damages caused by its own negligence, on the ground that the shipowner had a right to rely on the stevedore to remove the cause, would be to restore the kind of right to indemnity which § 905(b) eliminates. It seems to us that on any fair assessment of the legislative scheme in § 905(b) the implication of a right of exoneration in the shipowner from an employer based on the "independent contractor" relationship would be alien to Congress' intention. The rule regarding indemnity agreements, while not directly applicable to the question of whether the shipowner can be found negligent, is a crucial part of the legislative scheme. To maintain the integrity of that scheme, we should not adopt a rule as to negligence that is so inconsistent with the indemnity prohibition as to undermine a principle which Congress has established as fundamental. As stated in an analogous context in *Laird*

v. *Nelms,* 406 U.S. 797, 802 (1972): "To permit [defendant] to proceed on [an independent contractor] theory here would be to judicially admit at the back door that which has been legislatively turned away at the front door. We do not believe the Act permits such a result." There is no warrant for a contention that a right of indemnity arising out of the relationship between an employer and its independent contractor is intrinsically immutable. Congress has excised that incident of the relationship "as a matter of public policy" in cases covered by § 905(b).

As an abstract matter an argument can be made that after turning over a job of work to be done aboard its ship to a stevedore a shipowner ought not to be liable for damages suffered by a longshoreman for pre-existing dangerous conditions it has created, or negligently failed to correct. The argument advanced in some of the cases, as noted in the dissenting opinion in *Canizzo, supra,* is that when dangerous working conditions arise the shipowner may justifiably rely on the independent contractors to "take care of the problem as they were bound to do." *Id.,* slip op. at 3216.[11] Even if it might be said that there can be such a duty to the shipowner, despite an express redaction in § 905(b) of any remedy for its breach, that would not relieve the ship of its own duty to exercise reasonable care. But a provision in a law which has been enacted by

[11] Statements in some of the cases to the effect that "[t]he shipowner had no duty to supervise the minute details of work totally entrusted to the competence of the stevedore," as in *Munoz, supra,* 553 F.2d at 840, and in *Ruffino, supra,* 559 F.2d at 863, when read in context, are relevant only to whether a shipowner had notice of a claimed defect. They do not address the problem in this case.

Congress must be distinguished from one which might have been but was not. Our concern is not to assess the fairness of a legislative scheme. Even if we were permitted to do so, we could not say that there is no rational, fair basis for holding a shipowner liable for its own negligence, instead of singling out the stevedore who did not create the risk, to be solely responsible.

Whether due care has been exercised in any negligence case depends on what care has been taken—not on who has been hired to take it. Since the work was permitted to go forward under conditions of danger known both to the ship and to the stevedore, the rule of § 343A(1) should have been applied by the jury to the facts of the case as they might find them to be in order to determine whether the defendant is liable for damages. "Should the jury be persuaded . . . and find that the shipowner was negligent in not correcting the open and obvious danger but that the plaintiff was contributorily negligent, it would apply the doctrine of comparative negligence to reduce the shipowner's liability proportionately." *Napoli, supra,* 536 F.2d at 509.

The ruling of the court below took from the jury both the issue of the defendant's responsibility for the unsafe condition of the place where the plaintiff was required to work, and the issue of to what degree, if any, his own conduct in the face of the known danger should reduce his recovery. As we have indicated above, both issues should have been left to the jury. Accordingly, we reverse and remand for further proceedings not inconsistent herewith.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-72

WALTER COX,

Petitioner,

—against—

FLOTA MERCANTE GRANCOLOMBIANA, S.A.,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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MORRIS CIZNER
On Reply

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Samuels v. Empresa Lineas Maritimas Argentinas, 573 F.2d 884 (5th Cir., May 26, 1978) 3, 7, 8

Wiles, Jr. v. Delta Steamship Lines, Inc., 574 F.2d 1338 (5 Cir. June 15, 1978) 3, 8

Authority:

W. Prosser, Law of Torts, Section 34, at 180 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-72

WALTER COX,

Petitioner,

—against—

FLOTA MERCANTE GRANCOLOMBIANA, S.A.,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

I

Following the opinion of *Canizzo* which was critical of the *Cox* decision and revealed the disagreement between the various judges, the Second Circuit decided *Lopez* v. *A/S D/S Svendborg and D/S of 1912 A/S*, Docket No. 78-7046 (July 24, 1978). The Opinion is not yet officially reported and it is set forth in Respondent's brief in their Appendix.

The three-judge panel there was unanimous in its disagreement with the *Cox* decision and characterized the confusion that exists as follows:

> "The recent decision in *Cox* v. *Flota Mercante Grancolombiana, S.A.*, No. 77-7338 (2d Cir. May 10, 1978),

reversed a jury verdict in favor of Cox, a longshoreman, against the ship on the ground that it was the stevedore's duty alone as an independent contractor to remedy unsafe conditions. The *Cox* decision was handed down in 'the face of known disagreement by a majority of [the] panel' in *Canizzo, supra,* which *upheld* a jury verdict for a longshoreman against a ship and included a comment on *Cox's* contrary view.'

This case also will fall within what seems to be rapidly becoming an overly complex and unpredictable body of law. Because of the different views as to whether an employer's failure to remedy a dangerous condition is a defense to a suit by the longshoreman against a ship for its own negligence, we feel that it may not be amiss to explain why we do not agree that the failure of the stevedore to remove or provide protection against the conditions created by the shipowner relieves the latter of liability for injuries to a longshoreman caused by those conditions." (Respondent's Appendix, pp. 23a-25a).

Shipowner, in *Lopez,* suggested an En Banc hearing to hear argument of the appeal, rather than having it heard by a three-judge panel. The suggestion was denied. Since the Opinion, another suggestion for an En Banc hearing has been made but there is no determination as yet.

Although *Canizzo* and *Lopez* find *Cox* in conflict with those cases as well as *Lubrano, Napoli* and *Landon,* shipowner here finds no conflict or confusion citing a District Court Judge as proof thereof.

The Opinion of Judge Charles L. Brieant in *Leon Karczewski* v. *Flota Mercante Grancolombiana, S.A.,* 77 Civ.

4193, which is not yet officially reported, and is set forth in the Appendix to this Reply, shows clearly the results of confusion in the District Court.

Respondent refuses to face the position of the Fifth Circuit on concurrent negligence, which is directly contrary to *Cox.* In *Samuels* v. *Empresa Lineas Maritimas Argentinas,* 573 F.2d 884 (5th Cir., May 26, 1978), the Court upheld the right of a longshoreman to recover in full against the steamship company when both shipowner and stevedore were concurrently negligent. The Court there said at page 889:

> "To permit the employer's negligence to reduce the joint tortfeasor vessel's liability would reduce the award of plaintiff, the one person who is blameless. The innocent victim of concurrent negligence would find that, through some (to him inscrutable) judicial attempt to achieve equity for other parties, he must accept a partial loaf of compensation for the full loaf of joint and several liability."

In *Wiles, Jr.* v. *Delta Steamship Lines, Inc.,* 574 F.2d 1338 (5th Cir., June 15, 1978), the Court of Appeals approved of *Samuels* and held that:

> "(1) a vessel owner may be liable for an open and obvious danger if the invitee-longshoreman is not in a position to fully appreciate the risk or to avoid the danger even if aware of it, and (2) if the vessel owner is found to be negligent, the question of whether the longshoreman was himself negligent must also be considered under application of the admiralty rules of comparative negligence." (P. 1338).

The Court also remanded for further consideration the issues: "—(1) was the vessel owner negligent, and (2) if so, was the plaintiff himself (as distinguished from his employer) also negligent." (P. 1339).

The Ninth Circuit agrees with the Fifth Circuit and the Second Circuit (minus *Cox*) and in *Dodge* v. *Mitsui Shintaku Ginko K.K. Tokyo,* 528 F.2d 669, 9th Cir. 1975, cert. den. 1976, 425 U.S. 944, the Circuit Court held that a longshoreman, who has received injuries caused by the concurrent negligence of his stevedoring employer and the shipowner, can recover the full amount of his damages from the shipowner.

II

Respondent distorts the meaning of the amended statutes, Congressional intent and case holdings in its attempt to show no conflict or inconsistencies between *Cox* and other cases. To achieve this result, they claim that the unsafe condition was created by stevedore and then misinterpret various opinions that such creation alone relieves shipowner of liability.

It is pointless to go into the multiplicity of distortions set forth by Respondent as they are in the main irrelevant to this proceeding for the writ. However, the following should be noted:

1. (a) The issues of law upon which *Cox* is based has nothing to do with "creation".

(b) "Creation" alone is not a basis for relieving shipowner of its negligence.

(c) Shipowner urged the same theory of "creation" in the Circuit Court and the *Cox* opinion ignores this theory completely, obviously not adopting it. It should be noted that *Lopez* interprets *Cox* as pertaining to an unsafe condition created by *the shipowner,* which it actually was.

(d) Shipowner furnished a hatch with unsecured beams and inadequate beam locks, requiring pins. The pins were ship's equipment and the ship's crew was supposed to and agreed to supply and insert them but failed to do so. This is the unsafe condition that shipowner claims was "created" by stevedore because they continued to work. Shipowner engages in bald distortion of fact and definition. The condition causing the accident was simply a dangerous one, caused, created and maintained by shipowner. It definitely was not created by stevedore.

2. Shipowner finds significance in the alleged fact that four cases were remanded to the District Court for "further findings". This is a mistake. *Lubrano* had not been allowed to go to the jury and had to be returned for a new trial. *Lopez* was remanded for a new assessment of damages only. *Landon* was an appeal from the dismissal of a third party complaint by shipowner against stevedore. The *Napoli* trial ended in a defendant's verdict and on appeal was reversed and remanded for a new trial with a proper charge. Parenthetically, the conditions complained of in *Napoli* did not exist prior to stevedore boarding the vessel.

Either shipowner is confused or seeks to muddy the waters and prolong the confusion.

3. There is no basis for the claim that the amended statute limited and narrowed the standard of care applicable to shipowner.

The Senate Committee report pertaining to the amendment, in speaking of the example of an oil spill on the deck causing injury, states that to recover the longshoreman must establish—"or 2) the foreign substance had been on the deck for such period of time that it should have been discovered and removed by the vessel in the *exercise of reasonable care* by the vessel under the circumstance". Pp. 10-11. (Emphasis supplied)

The Senate Report also sets forth that the Committee intends that "—an employee injured on board a vessel shall be in no less favorable position vis-a-vis his rights against the vessel as a third party than as an employee who is injured on land—". P. 11.

The Senate Report at Page 2 refers to longshoring as a "high risk occupation". "Longshoring, for example, has an injury frequency rate which is well over four times the average for manufacturing operations" (Page 2) and at Page 12 states "—manufacturing remains one of the most hazardous types of occupations".

Thus, the standard of care is reasonable care under the circumstances. Ingrained in our common law of negligence is the concept that the greater the risk the higher the degree of care required of the landowner to its invitees. As is set forth in W. Prosser, Law of Torts, Section 34, at 180, "The amount of care demanded by the standard of reasonable conduct must be in proportion to the apparent risk. As the danger becomes greater, the actor is required to exercise caution commensurate with it".

Since Congress itself characterized longshoring as high risk and one of the most hazardous types of occupations,

and since shipowner must exercise reasonable care, the degree of the standard of care is necessarily a high one, not limited or narrowed.

There is no basis for shipowner claiming a reduction or lessening of the standard of care on their part.

III

The remarks by respondent with respect to Workmen's Compensation benefits and the compromise effected in the amending of the statute is *not* set forth as Congress intended. *In Samuels* v. *Empresa Lineas Maritimas Argentinas, supra,* the Circuit Court said:

> "The fundamental Congressional aims in 1972 were two-fold: (1) eliminate the unseaworthiness action but leave in its stead a negligence action with promotion of shipboard safety as a primary focus; (2) eliminate any form or vestige of the shipowner's attempt to shift liability (in whole or in part, directly or indirectly) to the stevedore. *See Robertson, supra,* 7 J.Mar.L. & Com. at 484-85." (P. 888).

The increase in compensation benefits was not to substitute in place of a cause of action in negligence against shipowner; nor was the amount of the benefit based on magnanimity. The rates were based on the average weekly national average and in no event more than two-thirds of the injured longshoreman's average wage.

Limiting the injured longshoreman to Workmen's Compensation is depriving him of a substantial economic right which he has in the suit against shipowner for negligence.

The more severe the disability, the greater his economic loss if limited to compensation.

That was not the intent of Congress. See *Canizzo*, *Lopez*, *Wiles* and *Samuels*.

CONCLUSION

It is respectfully submitted that the Petition for a Writ of Certiorari, in the interests of justice, should be granted.

Respectfully submitted,

ANGELO C. GUCCIARDO
Attorney for Plaintiff

MORRIS CIZNER
On Reply

APPENDIX

Endorsement

Leon Karczewski, Plaintiff v. *Flota Mercante Grancolombiana, S.A., Defendant.*

77 Civ. 4193—CLB.

Since this motion was served and filed, the Court of Appeals has issued two decisions: *Cox* v. *Flota Mercante Grancolombiana, S.A.*, Dkt. No. 77-7338, decided May 10, 1978, and *Canizzo* v. *Farrell Lines, Inc.*, Dkt. Nos. 77-7292, 77-7332, decided June 2, 1978. In *Canizzo*, Judge Friendly, dissenting in part, noted that the two cases are not consistently decided and that "our district judges can scarely be expected to function with so discordant a chorus on this court."

As a matter of discretion, the Court declines to grant summary judgment here unless and until there is a further elucidation of the apparent conflict. Motions for summary judgment are addressed to the discretion of the Court. *Petition of Bloomfield Steamship Co.*, 298 F.Supp. 1239, 1242 (S.D.N.Y. 1969), *aff'd.* 422 F.2d 728 (2d Cir. 1970). This case can best be resolved on a full trial record.

The motion is denied, with leave to renew in the event of a further pronouncement by the Court of Appeals.

So Ordered.

Dated: New York, New York
June 6. 1978

CHARLES L. BRIEANT
U.S.D.J.